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Workmen's Compensation Acts in the United States

The Legal Phase

Research Report Number 1

April, 1917

(Revised August, 1919)

National Industrial
Conference Board

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Foreword

THE accompanying report on the Legal Phase of Workmen's Compensation Acts in the United States is a revision of a report originally issued by the Board in April, 1917.

The revision consists mainly of the insertion of references to new legislation enacted or new decisions rendered on this subject during the intervening period.

Workmen's Compensation Acts in the United States

THE LEGAL PHASE

I

THE ADOPTION AND GROWTH OF THE COMPENSATION PRINCIPLE

Systematic compensation for work injuries is now a world practice. Since the adoption of the first comprehensive national scheme by Germany, in 1884, no fewer than fifty-three countries or provinces,[1] including every European nation save Turkey, have followed suit. The legislation varies greatly in the number and character of occupations included, the rate of payment and the mode of assuring and administering it, but its fundamental principle is universal. The basis of compensation is no longer fault actually proved or imputed, but the coincident fact of injury while at work.

In our own country, Maryland in 1902 first applied the principle in a limited way to certain occupations. The act was invalidated by a court of first instance, but no appeal was taken. Montana enacted a miners' compensation act in March, 1909, which also was invalidated. New York in 1909 appointed a commission whose elaborate report was followed by the invalidated enactment of 1910.[2] That period really marks the beginning of systematic compensation legislation; and now one federal and over forty state commissions of inquiry, reinforced by extended private investigations at home and abroad, have examined both the economic and legal phases of

[1] See Appendix, Table B, page 60.

[2] Labor Laws 1910, Chap. 674.
Ives v. *S. Buff. R.R. Co.*, 201 N. Y., 271.

the subject. Forty-two states,[1] the territories of Alaska, Hawaii, and Porto Rico have enacted compensation laws, the United States adopting a like principle for the relief of its civilian employees under date of September 7, 1916. The majority of our industrial workers no longer labor under the common-law principles of employer's liability.

Workmen's compensation laws have been enacted in every state in the union except Arkansas, Florida, Georgia, North Carolina, South Carolina, and Mississippi. During the 1919 legislative sessions Tennessee, North Dakota, Alabama, and Missouri, enacted compensation laws, and several other states passed amendatory acts. Bills were introduced but not acted upon in Arkansas and North Carolina.

The form of our legislation has been strongly influenced by that of the British compensation acts of 1897 and 1906. The substantial features, however, reflect a persisting endeavor to naturalize and apply the economic theories underlying the accident relief features of the German system of social insurance. That system provides a scheme of mutual compulsory insurance jointly administered by its contributors. Here, however, compulsory industrial accident funds are universally administered by public officers and not by the contributors.

While fundamentally affected by foreign examples, our state enactments are sharply modified by local traditions, phraseology, and various political and social influences, as well as by constitutional limitations, which, in adapting the parent pattern to its environment, have produced many dissimilarities in detail and phraseology and in the consequent judicial and administrative construction. The resultant obligation of the employer to assure limited compensation for work injuries, and the reciprocal duty and right of the employee to accept it, vary greatly, therefore, in different states. There is not only a decided lack of uniformity in statutory language, but a decided legislative intent to produce varying degrees of liability, with some decided differences of judicial opinion as a consequence.

[1] Ala., Ariz., Cal., Colo., Conn., Del., Idaho, Ill., Ind., Iowa, Kans., Ky., La. Me., Md., Mass., Mich., Minn., Mo., Mont., Neb., Nev., N. H., N. J., New Mexico, N. Y., North Dakota, Ohio, Okla, Ore., Pa., R. I., South Dakota, Tenn., Texas, Utah, Va., Vt., Wash., W. Va., Wis., Wyo. A similar statute for the Philippine Islands is excluded from consideration on account of its very limited application. (See Appendix, Table A, page 59.)

Purpose of Survey

The purpose of this brief survey is to epitomize the legal status of the employer in the light of the present operation, and administrative and judicial interpretation of compensation legislation in its more important aspects. The inquiry, while not exhaustive, covers most of the essentials and is primarily for laymen.

Two difficulties worthy of note confront the investigator at the threshold of his task. One is the fundamental difference of judicial opinion respecting the essential nature of compensation legislation; the other is the comparative lack of systematic information respecting the operation of the legislation of the various states.

Judicial Theories of Compensation

Judicial decisions relating to the subject are numerous, uncompiled, in separate form, and divided by two contradictory conceptions of the nature of the legal relation established by this prevailing substitute for employer's liability. One school still regards the new system as providing a novel but limited remedy in tort. That is, it assumes that the injured worker, under a simplified procedure, is to be indemnified in a limited amount for a new form of misconduct imputed by law to his employer. Compensation in that view of the matter is intended, like the old liability statutes, to afford redress for a private wrong and is therefore a new regulation of private rights. The other school regards workmen's compensation as the writing by the State of a limited insurance policy, against work injury, into the labor contract. It vindicates this contractual regulation upon the generally recognized fact that under the conditions of modern industry, generally speaking, the circumstances out of which work injuries arise are only to a limited extent within the control of the parties and have therefore but a restricted relation to their conduct. The risk of injury is held to inhere in the manner in which the work of the world is now done. Accident originates, broadly speaking, in the environment of production rather than in the conduct of the persons involved. Thus responsibility for occupational injury becomes social rather than individual. Recognizing this fact, compensation acts sound

in contract and not in tort. They are intended to meet a public necessity, not a private wrong. Relief is afforded in terms of wage loss, substituting for the former uncertain recovery of damages commensurate with established wrong the assurance of substantial protection from the economic consequence of work injury. To secure this end the State in the interest of the public and the worker thrusts a new term into his contract of service, by virtue of which, in return for the certainty of limited relief, he loses former equivocal rights of action; the employer in turn is divested of his ancient rights of defense to become a limited insurer for work injuries occurring in the industry which he controls and operates.

These differing judicial conceptions of the relations established by workmen's compensation as a substitute for employer's liability, color legislative as well as judicial opinion and affect almost every phase of enactment, amendment, construction, and administration.

The decisions of the various boards, commissions, or temporary arbitrators, who administer the provisions of most of the existing acts, are incompletely reported or are unpublished. But the operation of these bodies is of the most practical importance in contracting or expanding the application of a statute, increasing or decreasing the cost of its administration, the expense to the litigants and the efficiency of relief. The reports of their operation are, generally speaking, so often lacking in adequate data as to defy legal analysis of their decisions, or deny definite comparisons between statutes or accurate economic appraisals of the old system and the new.

Commission Reports

Many of these administrative commissions present interesting and instructive reports, but the lack of uniform or scientific compilation of information makes difficult any practical comparison of their experience, while continuous amendment and frequent changes of administration and method often make it equally difficult to compare the older reports of the same state with the new. A reasonable uniformity in regulation, administration, and construction of our various acts, an obvious desideratum, can never be approximated or even intelligently recommended until the various states have adopted rational scientific

standards for compiling, systematizing, analyzing, and comparing their individual operation. This organization of information is indispensable for the intelligent application of experience to progress. Without it we can never hope to appraise practically the comparative value of these many vital experiments in legislation.

Lack of Accident Data

Despite years of assertion and debate respecting the number, extent, and duration of work accidents, we still lack approximately reliable figures. Nor are we informed as to the relation of the whole number of work injuries to the total of general accidents. The differences of opinion resulting from estimates predicated upon our incomplete data are well illustrated by a comparison of the calculations of two well-known students of these subjects presented in bulletins of the United States Bureau of Labor Statistics. One estimated from insurance data that some 25,000 fatal industrial accidents and 700,000 non-fatal injuries disabling for more than four weeks occurred annually in the United States;[1] the other, predicating his conclusions upon the report of the Massachusetts Industrial Accident Board for 1913–14, estimates the annual occurrence of 3,255,800 non-fatal industrial accidents disabling for one day or more and 5,690,000 reportable accidents.[2]

Either of these divergent opinions suggests the present and future field for the application of the compensation principle, the number and variety of claims to be examined and the relief to be provided. It must impress every thoughtful man with the increasing necessity for uniformity and certainty of obligation and right, if speedy and adequate relief is to be assured to the injured worker and a definite and insurable obligation ascertained for the employer.

[1] U. S. Bureau of Labor Statistics, Bulletin No. 157, page 6. Estimate of Dr. Frederick L. Hoffman.

[2] Address by Willard Fisher to Conference on Social Insurance, Washington, D. C., December, 1916. U. S. Bureau of Labor Statistics, Bulletin No. 212, page 360.

II

THE FORM AND VALIDITY OF STATE LEGISLATION

Elective and Compulsory Acts

The adoption of the compensation method, within the employments included, is without alternative for the employer in eleven states and Hawaii.[1] In thirty states, Alaska, and Porto Rico he may either accept it or suffer the abrogation of some or all of his common-law defenses in any action for negligence.[2] New Jersey and Pennsylvania abrogate all such defenses whether compensation be accepted or rejected. In the states where the employer may elect, the employee may, as a rule, likewise exercise an independent option. In Texas he is bound by his employer's choice. In Arizona compensation is compulsory for the employer, but the employee after injury may either accept compensation or pursue his common-law remedy.[3] But the Arizona legislature cannot confer such right of election after the employee's death upon his personal representative for the benefit of dependents.[4] In New York only the employer may elect.[5] Public employees are wholly or partially covered in twenty-seven states. In twenty-three of these inclusion is compulsory; in some only manual laborers are included; in others those in the service of the municipalities are excluded.

Ohio Act Sustained

The original compensation act of Ohio was elective in form, but since the adoption of a constitutional amendment in 1912 authorizing the creation of a state insurance fund, requiring its administration by the State and compulsory contribution thereto by employers, the provisions

[1] Ariz., Cal., Idaho, Ill., Md., N. Y., Ohio, Okla., Utah, Wash., Wyo.

[2] Colo., Conn., Del., Ind., Ia., Kan., Ky., La., Me., Mass., Mich., Minn., Mo., Mont., Neb., Nev., N. H., N. J., N. M., N. Dak., Ore., Pa., R. I., S. Dak., Tex., Tenn., Va., Vt., W. Va., Wis.

[3] *Cons. Arizona Smelting Co.* v. *Ujack*, 15 Ariz., 382.

[4] *Behringer* v. *Inspiration Cons. Copper Co.*, 17 Ariz., 232.

[5] *Herkey* v. *Agar Mfg. Co.*, 153 N. Y. Supp., 369.

of the act have been made compulsory upon all employers of five or more workmen, but optional as to employers of less than this number.[1] This classification has been sustained on appeal to the Supreme Court of the United States.[2] In California compensation is compulsory for industrial employees, but elective as to domestic service and farm labor.[3]

Presumptions of Election

In nineteen states,[4] Alaska, and Porto Rico election of the compensation system by the employer and employee is presumed unless either definitely rejects it. In Illinois, Kentucky, Maine, Michigan, Montana, New Hampshire, Nevada, and Rhode Island the employer must formally elect by notice to a state authority, while acceptance by the employee is presumed unless there is notice to the contrary. In Massachusetts the employer makes election simply by insuring in one of the approved private insurance companies. Similarly, in West Virginia and Texas employers make election either by subscribing to the state insurance fund or by insuring with a private underwriter.

Early Decisions on Constitutionality

The constitutional aspects of compensation legislation have been a continuous subject of discussion. The invalidation of the first New York act by its highest court naturally excited sharp criticism.[5] In accordance with the suggestion of that decision, however, a constitutional amendment enlarging the power of the legislature and enabling it to deal with the subject was adopted and the subsequent enactment thereunder has been sustained by both the highest court of that state and of the United States.[6] Other acts were invalidated in whole or in part by the Supreme Courts of Montana[7] and Kentucky,[8]

[1] Ohio Constitution, Sec. 35, Article 2.
103 Ohio Laws, page 72.
State v. *Industrial Commission*, 92 O. St. Reps. 434.

[2] *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S., 571.

[3] Stat. Cal., 1913, page 279 (Boynton Act).
Western Indemnity Co. v. *Pillsbury*, 170 Cal., 686.

[4] Colo., Conn., Del., Ind., Iowa, Kan., La., Minn. Mo., Neb., N. J., N. Mex., Ore., Pa., S. Dak., Tenn., Va., Vt., Wis.

[5] *Ives* v. *S. Buff. R.R. Co.*, 201 N.Y., 271.

[6] Constitution of New York, Article 1, Sec. 19, adopted November 4, 1913.
Jensen v. *So. Pac. Co.*, 215 N. Y., 514.
N. Y. Central R.R. Co. v. *White*, 37 Sup. Ct. Rep., 247.

[7] *Cunningham* v. *N. W. Improvement Co.*, 44 Mont., 180.

[8] *Ky. State Journal Co.* v. *Workmen's Compensation Board*, 161 Ky., 562.

but corrective legislation has in each instance since passed the judicial scrutiny[1] and almost every objection presentable has been met by the state courts.

Until 1917 compensation statutes had had but limited review by the Supreme Court of the United States. In two instances the acts of Ohio[2] and Washington[3] had been sustained; the former against the charge of arbitrary classification because it excluded from its terms all employers of less than five persons, the latter with respect to the exclusiveness of the compensation remedy. The Court has now had occasion to pass upon both elective and compulsory acts and test their fundamental principles. Seven cases were presented during 1916 on appeal from Washington, Iowa, New York, and New Jersey. Owing to deaths in the Court these cases were set for reargument, together with four other appeals from the same states and one from Ohio, all of which were heard in January, 1917. On March 6, 1917, the Court rendered opinions sustaining the New York, Iowa, and Washington acts; the two former by unanimous opinions, the latter by a divided Court.

Compensation in Supreme Court of the United States

These most important decisions were rendered in the cases of:

1. *The New York Central R.R. Co.* v. *White.*[4]
2. *Mountain Timber Company* v. *The State of Washington.*[5]
3. *Hawkins* v. *Bleakly*, Auditor of the State of Iowa, etc.[6]

THE NEW YORK CASE

Statement of Case

This was a writ of error from the Court of Appeals sustaining an award of the Workmen's Compensation Com-

[1] *Lewis and Clark County* v. *Industrial Accident Commission* (Mont.), 155 Pac., 268.

Greene v. *Caldwell*, 170 Ky., 571.

[2] *Jeffrey Mfg. Co.*, v. *Blagg*, 235 U. S., 571.

[3] *Northern Pac. R.R. Co.* v. *Meese*, 239 U. S., 614.

[4] 37 Sup. Ct. Rep., 247.

[5] 37 Sup. Ct. Rep., 260.

[6] 37 Sup. Ct. Rep., 255.

mission of the State of New York to Sarah White for the death of her husband from an injury arising during the course of his employment with the New York Central Railroad Company. It was contended that the award of compensation was wrongfully made, since the liability of the railroad company was determined exclusively by the Federal Employers' Liability Act of 1908, the decedent having been employed in interstate commerce at the time of his injury; and that the award deprived the carrier of property without "due process of law" and denied the "equal protection of the law" guaranteed by the Fourteenth Amendment.

The first point was held to be without merit, since the decedent, at the time of injury, was a watchman guarding construction materials of the carrier, and not engaged in work of interstate transportation, or what could be deemed a part of it.

Objections to the New York Act

The Court then examined the substantial objections.

First. That the Compensation Act subjected the carrier to liability, without neglect or default on his part or that of his agent, the injury being solely attributable to the fault of the employee.

Second. That the limited compensation prescribed interfered with the employee's right to a recovery commensurate with the damage sustained by the employer's fault.

Third. That both employer and employee were prevented from exercising their liberty to acquire property by making such contract as they chose respecting the terms of employment.

Meeting these points, the Court held:

The Court's Answer

First. That under its police power the State possessed complete authority to abolish or change existing rules of employer's liability and might modify the nature and extent of his duty and the test of negligence; that the scheme of compensation presented was, as a whole, the substitution of a better method of meeting inevitable work injury.

The power exercised was neither unreasonable nor arbitrary, and the police authority existed

> "to impose upon the employer the absolute duty of making a moderate and definite compensation in money to every disabled employee, or in case of his death to those who are entitled to look to him for support, in lieu of the common-law liability confined to cases of negligence."[1]

Second. It answers the objection to the act from the employee's standpoint by declaring:

> "Nor can it be deemed arbitrary and unreasonable, from the standpoint of the employee's interest, to supplant a system under which he assumed the entire risk of injury in ordinary cases, and in others had a right to recover an amount more or less speculative upon proving facts of negligence that often were difficult to prove, and substitute a system under which in all ordinary cases of accidental injury he is sure of a definite and easily ascertained compensation, not being obliged to assume the entire loss in any case but in all cases assuming any loss beyond the prescribed scale."[2]

Third. Meeting the objection that the statute strikes at the constitutional freedom of contract, the Court declares that, without qualifying or weakening its preceding declarations respecting the primary importance of rights of personal liberty and of private property, it recognizes in this statute a reasonable restraint laid on the exercise of these rights, since

> "The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare."[3]

The Court, answering the criticism that the act imposes no rule of conduct upon the employer with respect to the conditions of labor in the various industries, states that measures of prevention are not of sole interest to the public, since these may be accomplished by other statutes, while in the present instance the legislature is primarily concerned in averting the economic consequence flowing

[1] 37 Sup. Ct. Rep., 253.
[2] 37 Sup. Ct. Rep., 253.
[3] 37 Sup. Ct. Rep., 254.

from the loss of the support or earning power of the individual, and thus preventing pauperism, vice, and crime.

The Court sustains both the scheme of compensation presented as a whole and the method of securing its payment by requiring the employer either to give reasonable security for or to furnish satisfactory proof of his financial ability to meet his statutory obligation.

In conclusion, the Court sounds a significant warning by observing that it is not to be understood as holding that "any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable."

THE WASHINGTON CASE

Statement of Case

The foundation of this appeal was an action brought by the State to recover certain premiums based upon a percentage of the estimated payroll of a logging company, which sum was to be paid into the state accident fund, to which employers in certain classified hazardous occupations were under compulsion to contribute, in accordance with their classified risk. The Supreme Court of Washington gave a judgment in favor of the State (75 Washington, 581).

Mr. Justice Pitney delivered the majority opinion, sustaining the decision of the State Court and the validity of the compensation act; the Chief Justice and Justices McKenna, Van Deventer, and McReynolds dissented without expressing their reasons.

Distinction between New York and Washington Cases

Mr. Justice Pitney, after briefly summarizing the Washington statute and disposing of preliminary objections, points out that the chief distinction between this case and that involving the New York Compensation Act lies in the enforced contribution to the state fund, which is the essential characteristic of the Washington Act. This compulsory requirement, it had been urged, violated the "due process of law" and "equal protection" clauses of the Fourteenth Amendment, since it compelled the employer to contribute to the state accident fund whether

his own employees were injured or not, so that even though they were immune from injury or death, he was still required to make periodical contributions for the compensation of the disabled employees of his more negligent competitors.

Constitutional Test of Washington Act

The Supreme Court of Washington declared the act to legitimately possess the character of "a license tax upon the occupation, partaking of the dual nature of a tax for revenue and a tax for purpose of regulation." The crucial inquiry, declared Mr. Justice Pitney, whether the act be regarded as a regulation or a combination of regulation and taxation, depends, in turn, upon whether or not the Washington statute, under the Fourteenth Amendment, is a fair and reasonable exercise of governmental power, or so extravagant and arbitrary as to constitute an abuse of it. To apply this test to the statute before it, the Court asks and answers three questions:

1. Whether the chief object which the Washington statute undertakes to accomplish is of general and public rather than private and particular interest, so as to justify the restrictions upon personal liberty and the right of acquiring property resulting from its operation.

2. Whether the tax burden imposed upon the employer is reasonable in amount or of such a nature as to be manifestly oppressive.

3. Whether there is a fair distribution of the burden giving due consideration to the causes which make the legislation necessary.

Answering these questions in an elaborate discussion, the Court holds:

Establishment of a Compensation System a Public Concern

1. "The matter of compensation for accidental injuries with resulting loss of life or earning capacity of men employed in hazardous occupations is of sufficient public moment to justify making the entire matter of compensation a public concern, to be administered through state agencies."[1]

[1] 37 Sup. Ct. Rep., 265.

Burden not Excessive

2. It is declared that inasmuch as the compensation allowed is not objected to as unduly large, the burden resting upon industry cannot be regarded as excessive "if the State is at liberty to impose the entire burden upon the industry." If, declares the opinion, injuries in such employments as that covered by the Washington Act have become frequent and inevitable, and if, as in the New York case,

> "the State is at liberty, notwithstanding the Fourteenth Amendment, to disregard questions of fault in arranging a system of compensation for such injuries, we are unable to discern any ground in natural justice or fundamental right that prevents the State from imposing the entire burden upon the industries that occasion the losses. The act in effect puts these hazardous occupations in the category of dangerous agencies, and requires that the losses shall be reckoned as a part of the cost of the industry, just like the pay-roll, the repair account, or any other item of cost."

3. It is held that the plan of assessment insurance applying experience to the fixing of premiums for relative hazard is as just a means of distributing the burden of loss as has been suggested. On this point the Court held:

> "The plan of assessment insurance is closely followed, and none more just has been suggested as a means of distributing the risk and burden of losses that inevitably must occur, in spite of any care that may be taken to prevent them."[1]

Answer to Discriminations

Answering the criticism that more carefully managed plants are required to meet losses arising from the negligence of less careful competitors, it is pointed out that it is impossible to foresee when or in what plant or industry injury may occur. And that as the power exists in the State to provide for the relief of such disabilities or dependency as may ensue, it is reasonable to impose the burden of such relief upon the industry through a system of occupational taxes limited to the actual losses occurring, instead of imposing such obligation upon the particular employer in whose plant accidents may occur.

[1] 37 Sup. Ct. Rep., 267.

Examples of Similar Taxes

In conclusion, the Court calls attention to the fact that special excise taxes for regulation and revenue proportioned to the special injury attributable to particular activities are not new. It cites several instances of such legislation, among these perhaps the most illustrative is that of the tax imposed by many states upon dog owners, to remunerate the owners of sheep killed by dogs, the tax being imposed without regard to whether or not all the dogs taxed actually kill sheep.[1]

THE IOWA CASE

Statement of Case

This was an appeal from the United States District Court for the Southern District of Iowa, which dismissed an application for an injunction to restrain the enforcement of the Iowa Compensation Act (220 Fed. 378). It appears that since the appeal was taken the Supreme Court of Iowa had construed and sustained this act.[2] The Supreme Court of the United States consequently accepted that construction of the language of the act in determining the constitutional objections to it.

Iowa Act Elective

The Iowa Act, unlike that of Washington or New York, previously considered, is elective in form, possessing the general features common to similar statutes sustained by the various State Supreme Courts. To the main purpose of the act, the establishment of a compensation system, no constitutional objection was made, the criticism being confined to particular provisions of the law.

Acceptance under Duress

1. To the contention that the employer was subjected to undue duress by the threatened abolition of his common-law defenses in order to persuade him to accept the act, it was answered that the contention had been disposed of by the New York, Washington, and other decisions holding that the employer had no vested right in such defenses, which were subject to modification and abrogation by the State.

[1] *Morey* v. *Brown*, 42 N. H., 373.
Tenney v. *Lenz*, 16 Wis., 589.

[2] *Hunter* v. *Colfax Cons. Coal Co.* (Iowa), 154 N. W., 1037; 157 N. W., 145.

Changing Burden of Proof

2. It was objected that the employer was denied due process of law if he rejected the compensation system, because the burden of proof was then placed upon him to show that an injury was not the direct result of his negligence. It was held that rules fixing the burden of proof were subject to modification by the legislature, provided such changes were not unreasonable or conclusive of the rights of the party.[1]

Presumptions of Undue Influence

3. Objection was made to the provision requiring an employee rejecting the act to state in an affidavit who, if any one, requested or suggested that he do so; and if it were found to be the employer or his agent, there should be a conclusive presumption that the employee had been unduly influenced and his rejection of the act was void. This, however, was held to be a reasonable protective regulation in aid of the general purpose of the act.

Administration by Commission

4. It was objected that the administrative machinery provided denied "due process of law" to the employer. But the mode of administration, as interpreted by the Supreme Court of Iowa,[2] was sustained as securing to the party at interest a final judicial review upon all fundamental and jurisdictional questions.

Denial of Trial by Jury

5. An elaborate argument, to the effect that trial by jury was peculiarly guaranteed to the people of Iowa by incorporating into the act of Congress creating the territory a certain provision of the Ordinance of 1787, was disposed of by the conclusion that all antecedent legislation was superseded by the adoption of the State Constitution. The legislature of the State of Iowa was therefore possessed of the same right as any other state to limit the exercise of this right or provide for its waiver, as was done by the pending act.

[1] *Mobile*, etc., v. *Turnipseed*, 219 U. S., 35.

[2] *Hunter* v. *Colfax Cons. Coal Co.* (Iowa), 154 N. W., 1061.

Arbitrary Discrimination in Abolishing Defenses

6. It was objected that the act denied the employer the "equal protection of the law" because one section provided that where both employer and employee rejected the act the liability of the employer should be the same as though the employee had not rejected it. It was pointed out that the State possessed the absolute right to abolish or modify existing defenses and that there was no arbitrary discrimination, since the act further provided that if the employee rejected it the employer accepting it possessed against him all the usual common-law defenses.

These cases possess unusual interest, because in the course of them the Supreme Court of the United States, for the first time, had opportunity to examine both elective and compulsory compensation legislation and especially to pass upon the power of the State to compel contribution to a state accident fund, and thus place the seal of its approval upon the most prevalent forms of compensation legislation.

Constitutional Objections Answered by State Courts

Previous to these decisions by the Supreme Court of the United States a great number of supreme judicial tribunals had sustained the statutes of their respective states against the objection that they denied to employer or employee due process of law[1] or the equal protection of the law,[2] made arbitrary or invidiously discriminating classifications,[3] unduly impaired the right of free contract[4] or

[1] *State* v. *Creamer*, 85 Ohio State, 349.
State ex rel *Davis-Smith Co.* v. *Clausen*, 65 Wash., 156.
Sayles v. *Foley* (R. I.), 96 Atlantic, 340.
Hunter v. *Colfax Cons. Coal Co.*, 154 N. W., 1037.
Sexton v. *Newark Dist. Telegraph Co.*, 84 N. J. Law, 85.
Anderson v. *Carnegie Steel Co.* (Pa.), 96 Atlantic, 215.

[2] The above cases, and:
State v. *Mountain Timber Co.*, 75 Wash., 581.
37 Sup. Ct. Rep., 260.
Wood v. *City of Detroit*, 155 N. W., 592.
Wheeler v. *Contocook Mills Corp.*, 77 N. H., 551.
Shade v. *Ash Grove Lime & Portland Cement Co.*, 93 Kan., 257.
Porter v. *Hopkins* (Ohio), 109 N. E., 629.

[3] *Jeffrey Mfg. Co.* v. *Blagg*, 90 Ohio, 376. Conclusively affirmed, 235 U. S., 571.
State v. *Griffin*, 69 N. H., 1.
In re *Keaney* (Mass.), 104 N. E., 438.

[4] *Mackin* v. *Detroit-Timken Axle Co.*, 187 Mich., 8.
Sexton v. *Newark Dist. Telegraph Co.*, 84 N. J. Law, 85.
State v. *Clausen*, 65 Wash., 156.
Sayles v. *Foley* (R. I.), 96 Atlantic, 340.
Anderson v. *Carnegie Steel Co.* (Pa.), 96 Atlantic, 215.

the obligation of existing contracts,[1] abridged constitutional privileges and immunities,[2] denied the right to trial by jury,[3] destroyed vested rights by the abolition of remedial statutes and common-law remedies for defense,[4] abolished the right to judicial settlement of private controversies,[5] improperly delegated legislative or judicial power,[6] abolished the guarantee to every state of a republican form of government,[7] or established arbitrary class legislation.[8] Assailed in the field of the taxing power this legislation has been upheld against the fundamental objection that it appropriated public money for a private purpose[9] or laid upon private property taxation that was neither uniform nor equal.[10]

[1] *State* v. *Creamer*, 85 Ohio State, 349.
State ex rel *Nelson-Spelliscy Co.* v. *Dist. Court of Meeker County*, 128 Minn., 221.
Troth v. *Millville Bottle Works*, 86 N. J. Law, 558.

[2] *Greene* v. *Caldwell*, 170 Ky., 571.
Hunter v. *Colfax Cons. Coal Co.*, 154 N. W., 1037; 157 N. W., 145.
State ex rel *Davis-Smith Co.* v. *Clausen*, 65 Wash., 156.

[3] *Deibeikis* v. *Link Belt Co.* (Ill.), 104 N. E., 211.
Sayles v. *Foley* (R. I.), 96 Atlantic, 340.
Middleton v. *Texas Power & Light Co.* (Tex.), 185 S. W., 556.
Evanhoff v. *State Industrial Accident Com.*, 78 Or., 503.
(See also *Hawkins* v. *Bleakly*, 37 Sup. Ct., 255.)

[4] *Jensen* v. *So. Pacific Co.*, 215 N. Y., 514.
In re Opinion of Justices, 209 Mass., 607.
Greene v. *Caldwell*, 170 Ky., 571.
Deibeikis v. *Link Belt Co.*, 261 Ill., 454.
State v. *Creamer*, 85 Ohio State, 349.
Borgnis v. *Falk Co.* (Wis.), 133 N. W., 209.
(See also *N. Y. Central R.R.* v. *White*, 37 Sup. Ct., 247, affirming 216 N. Y., 653.)

[5] *Borgnis* v. *Falk Co.*, 147 Wis., 327.
State v. *Creamer*, 85 Ohio State, 349.
Cunningham v. *N. W. Improvement Co.* (Mont.), 119 Pac., 551.
Pigeon v. *Employers' Liability Assurance Corp.* (Mass.), 102 N. E., 932.
Western Metal Supply Co. v. *Pillsbury* (Cal.), 156 Pac. 491.

[6] *State* v. *Creamer*, 85 Ohio State, 349.
Sayles v. *Foley* (R. I.), 96 Atlantic, 340.
Borgnis v. *Falk Co.*, 147 Wis., 327.
Hunter v. *Colfax Cons. Coal Co.* (Iowa), 154 N. W., 1037.

[7] *Mountain Timber Co.* v. *Washington*, 75 Wash., 581.
Affirmed 37 Sup. Ct., 261. Declared proposition political, not judicial question.

[8] *Borgnis* v. *Falk Co.*, 147 Wis., 327.
Lewis and Clark County v. *Industrial Accident Board* (Mont.), 155 Pac., 268.
State v. *Clausen* (Wash.), 117 Pac. 1101.
State v. *Creamer*, 85 Ohio, 349.

[9] *Mountain Timber Co.* v. *State of Wash.*, 75 Wash., 581.
Markin v. *Detroit Timken Axle Co.*, 187 Mich., 8.
Cunningham v. *N. W. Improvement Co.* (Mont.), 119 Pac., 551.
Lewis and Clark County v. *Industrial Accident Board* (Mont.), 155 Pac., 268.

[10] *State* v. *Clausen*, 65 Wash., 156.
Mountain Timber Co. v. *Washington*, 75 Wash., 581. Sustained, 37 Sup. Ct. Rep., 260.

Abolition of Common-Law Defenses

No incident accompanying the subversion of the common-law system of liability has attracted so much attention, excited so much popular discussion, or been so frequently or bitterly contested in court as the abrogation of the customary defenses of contributory negligence, assumption of risk and fellow-service. The compulsion which the State has exercised by abolishing these defenses or interposing them to secure from employer or employee the acceptance of the new public policy it desired to promote is now universally regarded judicially as a justified form of what may be termed constitutional coercion.[1] The issue, as the courts have seen it, is not whether all rules of liability between employer and employee may be abrogated, but whether a reasonable body of new rules fitting the circumstances of modern industry may be substituted for the old. An arbitrary attempt to deprive the employer of his position under the old system without any beneficial status under the new was invalidated in a notable decision by the Supreme Court of Montana.[2]

Views of New York Court

The viewpoint of the judiciary in vindicating the exchange of new regulation for old is thus stated by Mr. Justice Miller, affirming the validity of the present New York Act, and by Mr. Justice Pitney in speaking for the Supreme Court of the United States and sustaining the same act against later attack. Mr. Justice Miller said:

> "No one doubts that the doctrine of assumption of risk and the fellow-servant doctrine also, developed by the courts under different conditions than those now prevailing, may be limited or entirely abrogated by the legislature. Acts having

[1] *State* v. *Creamer*, 85 Ohio State, 349.
Borgnis v. *Falk Co.*, 147 Wis., 327.
Crooks v. *Tazewell Coal Co.*, 263 Ill., 343.
Matheson v. *Minneapolis Street Ry. Co.*, 126 Minn., 286.
Shade v. *Ash Grove Lime & Portland Cement Co.*, 92 Kan., 146; 93 Kan., 257.
Greene v. *Caldwell*, 170 Ky., 571.
Young v. *Duncan*, 218 Mass., 346.
Sexton v. *Newark Dist. Telegraph Co.*, 84 N. J. Law, 85.
Western Metal Supply Co. v. *Pillsbury* (Cal.), 156 Pac., 491.
Middleton v. *Texas Power & Light Co.* (Tex.), 185 S.W., 556.
Jensen v. *So. Pacific Co.*, 215 N. Y., 514.
Anderson v. *Carnegie Steel Co.* (Pa.), 96 Atlantic, 215.
Cons. Arizona Smelting Co. v. *Ujack*, 15 Arizona, 382.

[2] *Cunningham* v. *N. W. Improvement Co.* (Mont.), 119 Pac., 554.

that power have been sustained by repeated decisions of this court. The power to limit or take away must also involve the power to extend. At the common law the servant was held to assume by implied contract the ordinary risks of employment, including the risk of a fellow-servant's negligence, and even negligence imputable to the master if the danger was obvious, or with knowledge of it the servant voluntarily continued in the employment. It would not be a great extension of that doctrine for the legislature to provide that the employee should assume the risk of accidental injuries, and if that can be done it is certainly competent for the legislature to provide by the creation of an insurance fund for the limited compensation of the employees for all accidental injuries regardless of whether there was a cause of action for them at common law." (*Jensen* v. *S. P. Co.*, 215 N. Y. 514.)

Justice Pitney for Supreme Court of the United States

Mr. Justice Pitney said:

"Nor is it necessary, for the purposes of the present case, to say that a State might, without violence to the constitutional guaranty of 'due process of law,' suddenly set aside all common-law rules respecting liability as between employer and employee, without providing a reasonably just substitute. Considering the vast industrial organization of the State of New York, for instance, with hundreds of thousands of plants and millions of wage-earners, each employer on the one hand having embarked his capital, and each employee on the other having taken up his particular mode of earning a livelihood, in reliance upon the probable permanence of an established body of law governing the relation, it perhaps may be doubted whether the State could abolish all rights of action on the one hand, or all defenses on the other, without setting up something adequate in their stead. No such question is here presented, and we intimate no opinion upon it. The statute under consideration sets aside one body of rules only to establish another system in its place. If the employee is no longer able to recover as much as before in case of being injured through the employer's negligence, he is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages. Instead of assuming the entire consequences of all ordinary risks of the occupation, he assumes the consequences, in excess of the scheduled compensation, of risks ordinary and extraordinary. On the other hand, if the employer is left without defense respecting the question of fault, he at the same time is assured that the recovery is limited, and that it goes directly to the

relief of the designated beneficiary. And just as the employee's assumption of ordinary risks at common law presumably was taken into account in fixing the rate of wages, so the fixed responsibility of the employer, and the modified assumption of risk by the employee under the new system, presumably will be reflected in the wage scale. The act evidently is intended as a just settlement of a difficult problem, affecting one of the most important of social relations, and it is to be judged in its entirety." (*New York Central R.R. Co.* v. *Sarah White*, 243 U.S. 188, decided March 6, 1917.)

Consensus of State Opinions

The substance of these two statements expresses similar conclusions reached by the courts of last resort of Connecticut, California, Iowa, Kentucky, Kansas, Massachusetts, Rhode Island, Texas, Washington, Minnesota, Michigan, New Hampshire, New Jersey, New York, Oregon, Pennsylvania, West Virginia, and Wisconsin.[1] Each vindicated the substitution of the new system for the old, the abrogation of some or all of the common-law defenses as a means of securing its adoption, and held it proper to infer an election by employer or employee from either their positive affirmation or their failure to reject, as the statute provided.[2]

Other Specific Objections Urged

The courts have likewise met many objections to the detail of specific legislation and their decision thereon serves to illuminate the subject. Thus it has been held that an act is not invalid, although severely restricting the previous freedom of action,[3] or because it establishes a different or an unusual practice or provides radical changes in either procedure or rules of evidence. Neither is an act invalidated by limiting its provisions to hazardous employments or placing upon one hazardous employment an obligation not likewise imposed upon another,[4] or

[1] See footnote 1, page 18, for cases adjudicated in certain of these states.

[2] See in this connection the interesting statement of Mr. Justice Van Deventer, Employers' Liability Cases, *Mondau* v. *N. Y., N. H. & H. R.R.*, 223 U. S. 1.

[3] *Borgnis* v. *Falk Co.*, 147 Wis., 327.
Western Metal Supply Co. v. *Pillsbury* (Cal.), 156 Pac. 491.
State v. *Creamer*, 85 Ohio St., 349.

[4] *State* v. *Creamer*, 85 Ohio St., 349.
State v. *Clausen* (Wash.), 117 Pac., 1101.
Jensen v. *So. Pacific Co.*, 215 N. Y., 514.
N. Y. Central R.R. Co. v. *White*, 37 Sup. Ct. Rep., 247.

because it requires contributions from an employer in a particular kind of employment and not from all employers.[1] Neither is an act destroyed by protecting its awards against contracts obtained from the employee which would nullify them,[2] nor by the fact that it includes or excludes non-resident aliens.[3] Nor is its legality affected by the creation of a special tribunal to administer it,[4] the shifting of the burden of proof from employee to employer,[5] nor because it works somewhat unequally with respect to different individuals,[6] for that is the necessary result of even fair classification.

Who May Question Validity

Neither employer nor employee may raise objections on the other's behalf; they cannot attack the validity of an enactment which affects the right of the other but not their own.[7] Neither can attack the validity of an act which he has elected to accept, unless upon the ground of undue duress in exercising the option. Issues outside of the law or the facts of the case presented cannot be urged against the validity of the statute.[8] The employer who is not accepting an elective act cannot assail it because it denies to an employer who has the right of a jury trial.[9] In other words, moot questions or merely suppositious constitutional rights cannot be asserted, but only such rights as may be taken from the individual by the proceeding before the court.

[1] Id. *Mountain Timber Co.* v. *Washington*, 75 Wash., 581.

[2] In re *Opinion of Justices*, 209 Mass., 607.
Hawkins v. *Bleakly*, 37 Sup. Ct. Rep., 257.
Hunter v. *Colfax Cons. Coal Co.* (Iowa), 154 N. W., 1037.

[3] *Gregutis* v. *Waclark Wire Works* (N. J.), 91 Atlantic, 98.
Victor Chemical Works v. *Industrial Board* (Ill.), 113 N. E., 173.
Petrozino v. *American Mutual Liability Co.*, 219 Mass. 498.

[4] *Hawkins* v. *Bleakly*, 220 Fed., 378; 37 Sup. Ct. Rep., 255.

[5] Id. *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S., 35.

[6] *State* v. *Creamer*, 85 Ohio State, 349.
Hunter v. *Colfax Cons. Coal Co.* (Iowa), 154 N. W., 1037.
Western Indemnity Co. v. *Pillsbury*, 170 Cal., 686.

[7] *Jeffrey* v. *Blagg*, 90 Ohio, 376. Affirmed 235 U. S. 571.

[8] *Sexton* v. *Newark Dist. Telegraph Co.*, 84 N. J. Law, 85.

[9] *Wheeler* v. *Contocook Mills Corp.*, 77 N. H., 551.

What Risks Remain under Compensation

Several states, notably Massachusetts,[1] are finding no little difficulty in determining or defining what risk of employment, if any, remains with the employee under a compensation act. Under the most liberal provisions of law there must still remain rational distinctions between limited insurance against the risks of employment and those of existence.[2]

[1] McNichols Case, 215 Mass., 497.
In re *Hurl*, 217 Mass., 223.
In re *Madden*, 222 Mass., 487.
Newman v. *Newman*, 155 N. Y. Supp., 665. Affirmed 113 N. E., 332.
Putnam v. *Murray*, 160 N. Y. Supp., 811.

[2] *Hoenig* v. *Industrial Commission* (Wis.), 150 N. W., 996.
Klawinski v. *Lake Shore & Mich. So. Ry.* (Mich.), 152 N. W., 213.
State v. *Dist. Court of Ramsey County* (Minn.), 153 N. W., 119.
Mahowold v. *Thompson & Starrett Co.* (Minn.), 158 N. W., 913.
City of Milwaukee v. *Althoff* (Wis.), 145 N. W., 238.

III

THE PERSONS TO WHOM COMPENSATION APPLIES

Influence of British Phraseology

All compensation legislation being highly remedial in character is broadly construed to effect the legislative purpose, but not so as to include either injuries or persons not intended to be comprehended within its terms. The construction and definition given by British courts to words and phrases which have been translated from that jurisdiction into United States legislation, while not dominating, is most influential in the great body of decisions.[1]

Influence of Administrative Construction

So, too, our courts do not regard the interpretation and construction given by the various administrative boards, generally lay bodies, as conclusive, although where long continued they are not likely to be disregarded unless judicial construction makes such action necessary.

Employer Primarily Liable

In all acts it is the employer who is primarily liable for the payment of compensation except where either he is required or elects to pay a fixed premium into a state accident fund. His personal liability is not relieved by insurance with any private underwriter.[2]

Who are Employers

An "employer" may be an individual, a partnership, a corporation, a receiver, or any individual person, collection or association of persons included within the terms of an act, who meets the test that there exists a contract of service between him and employees, otherwise within the statute, and subject to the employer's control in respect to

[1] *Newman* v. *Newman*, 155 N. Y. Supp., 665.
Hotel Bond Co. Appeal, 89 Conn., 143.
Grand Rapids Lumber Co. v. *Blair* (Mich.), 157 N. W., 29.
Gove v. *Royal Indemnity Co.*, 223 Mass., 187.

[2] In the absence of statute Massachusetts appears to hold contra, though the point has not been finally decided judicially.

the action out of which an injury arises.[1] The term "employer" may include both private and public employers, although we are concerned here only with the former, but it does not in any act include all persons giving employment. Thus it may include only employers in whole or in part within specific occupations, either enumerated or defined, or only those who employ "for profit," or the number of whose employees, as in Oklahoma, is three or more, or as in Vermont, eleven or more.

Contemporaneous Employment

Employment may be contemporaneous, that is, the employee may be in the service of two or more persons and may be entitled to compensation from any one or all.[2] Thus, a watchman guarding the property of several concerns may recover his compensation from the one upon whose premises he is injured.[3] Under acts which distinguish between principals and contractors the employer may be a person other than he whom the workman immediately serves.[4]

Who are Employees

The term "employee" covers a greater or lesser number of persons in accordance with the occupations included within the various acts. In every instance, however, an employee is a person between whom and the employer there is an actual or expressed contract of service, one essential element of which in all compensation legislation is an implied consideration to make provision in specified terms for such injuries as are within the act. The term usually embraces some continuity of service so as to exclude occasional or special service. "Casual labor," concerning the definition of which there is little unanimity,[5] is usually excluded from the benefit of compensation acts. Delaware, North Dakota, South Dakota, Pennsylvania, Rhode Island, Wyoming, California, Minnesota, and Missouri exclude such labor when not employed for the employer's business. Sixteen other states exempt it in terms.[6]

[1] *Hillestad* v. *Industrial Insurance Commission*, 80 Wash., 426.
Virginia & Rainy Lake Co. v. *Dist. Court*, 128 Minn., 43.

[2] *Jones* v. *Witherbee, Sherman & Co.*, 2 N. Y. St. Dep. Rep., 483.

[3] *Western Metal Supply Co.* v. *Pillsbury*, 156 Pac., 491.

[4] *Wallace* v. *Pratchner*, 2 Cal. I. A. C. Dec. 661.

[5] *Thompson* v. *Twiss* (Conn.), 97 Atlantic, 328.
State v. *District Court* (Minn.), 155 N. W., 103.

[6] Colo., Conn., Idaho, Ind., Ia., Pa., Me., Md., Neb., N. J., N. Mex., O., Tenn., Utah, Vt., W. Va.

A nurse or mining engineer has been held not to be an "employee," though the term may include a person other than one engaged in manual labor.[1] The fact that one at work is paid by the piece, the day, or the job will not prevent him from being an employee,[2] but the service must have some element of wages and not be merely voluntary.[3] A workman's son engaged by his father to help him,[4] or a partner,[5] or one working with another on shares, but not subject to his control or direction, does not meet the legal test of an "employee."[6]

Compensation of Injured Minors

Minors where at work under the age permitted by the state statute, although otherwise within a compensation act, may not recover compensation for injuries as employees in New Jersey,[7] Washington,[8] Minnesota,[9] or Wisconsin.[10] This condition, however, is qualified in New Jersey and Wisconsin.[11] In California,[12] Iowa,[13] and West Virginia,[14] on the contrary, under the same conditions the injured minor may receive compensation.

Coverage of Compensation Acts

About half the compensation states exclude a great number of persons from the benefits of their acts either by arbitrary definitions, which exclude many employments, or by the specific exception of particular occupa-

[1] Opinion Attorney General (Minn.), Workmen's Compensation Act, Bulletin 13, page 32. Report Nevada Industrial Commission, 1914, page 26.
Skinner v. *Conn. School for Imbeciles*, 1 Conn. Comp. Dec. 106.

[2] *Gove* v. *Royal Indemnity Co.*, 223 Mass., 187.
In re *Rheinwald*, 153 N. Y. Supp., 598.
Mallott v. *Healey*, 2 Cal. I. A. C. Dec. 103.

[3] *Lynch* v. *Abel*, 1 Conn. Comp. Dec., 520.

[4] *McDougall* v. *McDougall* (1911), 4 B. W. C. C., 373 Ct. of Session.

[5] *Sayers* v. *Gerard*, 1 Cal. I. A. C. Dec., 352.

[6] *Ferranti* v. *Kennedy*, 1 Conn. Comp. Dec., 196.

[7] *Hetzel* v. *Wasson Piston Ring Co.* (N. J.), 98 Atlantic, 306.

[8] *Hillestad* v. *Industrial Insurance Commission*, 80 Wash., 426.

[9] Opinion Attorney General (Minn.), Workmen's Compensation Act, Bulletin 9, page 22.

[10] *Stetz* v. *Mayer Boot & Shoe Co.* (Wis.), 156 N. W., 971.

[11] *Foth* v. *Macomber*, etc., 161 Wis., 549.

[12] *Shanton* v. *Masterson*, 2 Cal. I. A. C. Dec., 707.

[13] Opinion Special Counsel to Ia. Industrial Commission (1915), page 922.

[14] *Rhodes* v. *J. B. B. Cool Co.*, 90 S. E. 706.

tions. Fourteen states[1] and Alaska in effect make insurance compulsory only for hazardous employments. New York, however, designates forty-two "hazardous" classifications, and by amendment of 1918 adds a new group which includes "all other employments not hereinbefore enumerated," in which four or more workmen or operatives are regularly employed. Four other states[2] specify a list which practically comprehends all industrial pursuits. Alaska covers only employers of five or more persons engaged in mining operations. The descriptive terms vary greatly. New Hampshire includes five employments which are termed "dangerous." Kansas and Arizona confine the act to "especially dangerous" employments, Montana to "inherently hazardous," four states[3] to "hazardous," and five more to "extra hazardous" occupations.[4]

Exemptions of Agricultural Labor

In the absence of definite or even arbitrary standards of comparative hazard such legislation tends to become indefinite and uncertain. For instance, only New Jersey specifically includes agricultural employees within its act. Thirty states specifically exclude them. In others the exemption appears to be practically accomplished by excluding employers of less than a fixed number of persons. In no classification of "dangerous" or "hazardous" occupations is agricultural labor included. Yet European and Canadian official reports and all our own private insurance experience and rates unite to demonstrate that many forms of agricultural employment are comparatively more hazardous than the mechanical trades.

A report of the United States Bureau of Labor Statistics estimates that 32 per cent of our employees, calculated upon the census returns of 1910, are not within the terms of compensation legislation, and of that number 33.9 per cent[5] are excluded through the exemption of agriculture.

Domestic Service

Except in New Jersey, domestic service is exempted from compensation acts, either by specific exception in some twenty states, by the exclusion of employments not conducted for gain, or of employers of less than a fixed number of persons.

[1] Ariz., Ill., Kan., La., Md., Mont., N. H., N. J., N. Dak., N. Mex., Okla., Ore., Wash., Wyo.

[2] Ill., Md., Ore., Wash.

[3] La., Okla., Ore., N. Y.

[4] Ill., Md., N. Mex. Wash., Wyo.,

[5] Bureau of Labor Statistics (U. S. Dept. of Labor Bulletin, No. 203, page 71).

Small Employers

Seventeen states exclude small employers, varying from Oklahoma exempting employers of less than three persons, to Vermont exempting those of less than eleven. Of the effect of these provisions, Professor Fisher, of New York University, declares:

> "Only 5 of the 13 States which profess to limit their laws to dangerous trades took any account of the numbers employed; and of the 16 States which have numerical exemptions only the same 5 professed generally to distinguish between hazardous and non-hazardous trades."[1]

Percentage of Labor under Compensation Acts

The United States Bureau of Labor Statistics in the report just mentioned estimated that 68 per cent of our employees are included within compensation acts. The percentage is estimated to be much higher in many of the leading industrial states and lower in the agricultural.[2] Later estimates revise this, and it is now commonly given as 50 per cent.

Various Exclusions by Definition or Construction

Exclusive of enumerated groups of occupations or conditions of employment specifically exempted, failure to clearly define other important terms narrows or broadens the definition of "employer" and "employee" in many statutes. Thus the terms "sub-contractor" or "independent contractor" are more or less extensive in different acts. Massachusetts and New Jersey present contrary ideas in their statutes respecting the obligation of contractors as employers.[3] West Virginia excludes traveling salesmen from its act by definition; the courts of Michigan and California have done so by interpretation.[4] Minnesota, on the contrary, includes them if in the employ of a Minnesota employer,[5] and New Jersey while in the state whether residents of it or not.[6] Although coal mining is

[1] Address to Conference on Social Insurance, Washington, D.C., December, 1916. Bureau of Labor Statistics, U.S. Dept. of Labor, Bulletin 212, pages 364–5.

[2] Bureau of Labor Statistics (U.S. Dept. of Labor, Bulletin No. 203, page 66).

[3] *Kennedy* v. *Kauffman & Sons Co.* (N. J.), 91 Atlantic, 99.
Workmen's Compensation Act, Mass., pt. 3, Sec. 17.

[4] *Keyes-Davis Co.* v. *Alderdyce*, Op. Mich. Industrial Accident Board, Bulletin No. 3, page 19.
Croad v. *Paraffine Paint Co.*, 1 Cal. I. A. C. Dec., 179.

[5] Opinion of Attorney General, Minn. Workmen's Compensation Act. Bulletin 9, page 17.

[6] *American Radiator Co.* v. *Rogge*, 86 N. J. Law, 436.

one of the leading industrial pursuits of Tennessee, insurance is voluntary on the part of employers of coal miners in that state and failure to insure involves no additional liability.

Extra-Territorial Application

In sixteen states the employer must indemnify although his employee be injured while in another jurisdiction.[1] In nearly an equal number of states such is not the law. In thirteen the statute is indefinite. Alaska, Hawaii, California,[2] Connecticut,[3] and Rhode Island[4] require compensation for injuries received outside the state if the contract of service was made within it. Under like circumstances the acts of Maryland and Pennsylvania do not apply. Maryland compromises, following the latter rule except for mining employees injured while at work in a mine the entrance of which is within the state. By construction Nevada,[5] Minnesota,[6] Michigan,[7] and Massachusetts[8] have held their acts inapplicable to injuries received outside the state. The courts of New Jersey,[9] New York,[10] and Washington[11] without statutory provision on the subject, hold their respective acts applicable to injuries received outside the state while in pursuance of the employee's occupation.

Connecticut holds that compensation is obligatory for an accident occurring elsewhere, the contract of employment being made in Connecticut, and likewise for an injury received while at work in Connecticut upon a contract of service made in New York.[12] New Jersey will entertain and enforce a claim for compensation for an injury received in New Jersey by an employee resident of

[1] Col., Conn., Idaho, Ind., Ky., Me., Mo., Nev., N. J., N. Y., Ohio, S. Dak., Utah, Va., Vt., W. Va.

[2] *Sandberg* v. *Kruse*, 1 Cal. I. A. C. Dec., 441. But see *North Alaska Salmon Co.* v. *Pillsbury*, 162 Pacific, 93.

[3] *Kennerson* v. *Thames Towboat Co.*, 89 Conn., 367.

[4] *Grinnell* v. *Wilkinson* (R. I.), 98 Atlantic, 103.

[5] Report Nevada Industrial Comm. (1914), page 25.

[6] Opinion Attorney General Minn. Compensation Act, Bulletin 9, page 15.

[7] *Keyes-Davis Co.* v. *Allerdyce*, Opinion Mich. Federal Industrial Accident Board, Bulletin No. 3, page 19.

[8] Gould's Case, 215 Mass., 480.

[9] *Davidheiser* v. *Hay Foundry & Iron Works*, 87 N. J. Law, 688.

[10] *Post* v. *Burger & Gohlke*, 216 N. Y., 544.

[11] Rulings Washington Industrial Ins. Comm. (1915), page 5.

[12] *Kennerson* v. *Thames Towboat Co.*, 89 Conn., 367.
Cohen v. *Union News Co.*, 1 Conn. Com. Dec., 62.

another state and under contract of service made in such state.[1] It was suggested that the effect of these opinions was to permit a double recovery of compensation, to which the court of New Jersey has replied, "Recovery of compensation in two states is no more illegal and is not necessarily more unjust than recovery upon two policies of accident or life insurance."[2]

Minnesota presents still another aspect of these conflicting views and practices by denying compensation to a workman employed in Minnesota but injured in Wisconsin, holding that he cannot be deemed ignorant of the act of the state where his employment service is performed and his redress must be had.[3]

Causes of Conflicting Judicial Opinion

These conflicts of opinion apparently arise from fundamentally different judicial concepts of the nature of workmen's compensation. The Minnesota Court regards it as creating a tort relation, providing redress for a wrong caused by another's misconduct and therefore governed by the law of the place of injury and not the law of the place where the employment contract was made. The courts of New Jersey, Connecticut, and New York regard the new system as resting upon the creation of a new contract, not a tort relation, and to provide its relief independently of the conduct of either party with respect to the circumstances of the injury, and therefore enforceable by comity in the court of any state. These decisions serve to illustrate the need of not merely a uniform system of regulation, but a harmonious conception of the fundamental distinction between the old system of employer's liability and the new system of workmen's compensation.

Interstate Commerce

The general powers of a state to enact compensation legislation are no longer open to question. The line of demarcation as to employees engaged in interstate commerce has been carefully set forth. In the case of New

[1] *American Radiator Co.* v. *Rogge*, 86 N. J. Law, 436.
West Jersey Trust Co. v. *Phil. & R. Ry. Co.*, 88 N. J. Law, 102.

[2] *Rounsaville* v. *Central R. Co.*, 87 N. J. Law, 371.

[3] *Johnson* v. *Nelson*, 128 Minn., 158.

York Central R.R. Company v. Winfield,[1] it was definitely determined that Congress, having entered the field, the states no longer have any right to legislate with respect to employees of interstate railroads while they themselves are engaged in furthering interstate commerce, although the injured employee may have no remedy under the Federal Liability Act, and it was further decided in Erie R.R. Co. v. Winfield,[2] that the states have no right to require of interstate carriers or their interstate employees to make an election between the provisions of the Federal law and any state compensation law, or to presume or impute an election to them by any statutory presumptions. These decisions definitely place all employees of interstate railroads, engaged in furthering interstate commerce, under the liability act applicable to railroads and not under any state compensation laws.

Admiralty

In an important case[3] it was held that neither the Federal Employers' Liability Act nor a state compensation law applied to injuries coming within admiralty jurisdiction. To meet this situation Congress, by Act of October 6, 1917, amended clause 3 of Sections 24 and 256 of the Judicial Code, thereby saving to suitors the rights and remedies under the workmen's compensation law of any state and giving to the injured party, or his dependents, the right to bring an action in admiralty or submitting claim under a state compensation plan.

Power of Congress to Provide for Compensation

Congress undoubtedly possesses the power to establish a compensation system for employers and employees operating carriers engaged in interstate commerce. The question is noticed only incidentally here, as we are primarily concerned with compensation for industrial injury, although legislation or judicial decision relating to it will incidentally affect many industrial employments.

Compensation for Employees of Interstate Carriers

During the first and second sessions of the Sixty-second Congress an Employers' Liability and Workmen's Com-

[1] 244 U. S., 147, 37 Sup. Ct. Rep. 546.

[2] 244 U. S. 170, 37 Sup. Ct. Rep., 556.

[3] *Southern Pacific Co.* v. *Jensen*, 244 U. S., 205; 37 Sup. Ct. Rep., 524.

pensation Commission was created, consisting of two Senators, two members of the House, and two private citizens, who were authorized to investigate and report on the application of the principle of workmen's compensation to the federal jurisdiction.[1] Elaborate hearings were held and a bill was drafted and recommended applying the principle of compensation to interstate steam railroads. The bill passed the Senate by a large majority, was amended by the House to include interstate express companies, but failed to receive further consideration in the Senate. The second employer's liability act of 1908 is the only Congressional legislation dealing with personal injuries sustained by the employees of interstate carriers. It greatly modified the common-law rules of employer's liability, but applies only to interstate railroads.

State Cases Involving Federal Jurisdiction

This condition has led to a number of cases involving the application of state compensation legislation to injuries asserted to be within the federal jurisdiction. The acts of both New York and New Jersey have been held to permit compensation for injuries sustained upon the navigable waters of those states.[2] A New York court has held that the exclusiveness of the compensation remedy applies only to suits at common law, but that where the injury was sustained within the admiralty jurisdiction the employee may choose either remedy.[3] The same court likewise held the state compensation act to apply to injuries received by an employee in interstate commerce to the extent that such act may operate "within the jurisdiction of the State until Congress by entering the field excludes state action."[4] The courts of Connecticut, Minnesota, and New Jersey have taken a similar view, declaring likewise that the federal employers' liability act is not exclusive in that it prevents the states from exercising their police power for the protection of workmen within their respective common-

[1] Report Federal Employers' Liability and Workmen's Compensation Commission, 62d Congress, 2d Session, Senate Document No. 338.

[2] *Berton* v. *Tietjen & Lang Dry Dock Co.*, 219 Fed., 763.

[3] *Walker* v. *Clyde S. S. Co.*, 215 N. Y., 529.

[4] *Jensen* v. *So. Pacific Co.*, 215 N. Y., 514.

wealths.[1] The Supreme Courts of Illinois and California express a diametrically opposite opinion.[2]

The decisions of the Supreme Court in the cases hereinbefore cited under the heading of Interstate Commerce have now, however, brought about practical unanimity of decisions in the several states.

Dependents

The states differ very greatly in defining dependent persons and in limiting or extending the degree of dependency of those who may have the benefit of compensation for the accidental death of a workman. These differences very naturally reflect variations in policy, since the right to give or withhold a conditional recovery for death is created entirely by statute, save in a state like Kentucky, where a constitutional provision prevents any limitation on the amount recoverable for either injury or death due to negligence. This provision affected the validity of the first Kentucky legislation,[3] but was overcome by providing a permissive agreement for employer and employee, since the limitation applied to the act of the legislature and not to the private arrangement of the parties.

Non-Resident Alien Dependents

Non-resident alien dependents are an important subject of legislative and judicial consideration. The mere fact that a dependent is an alien does not of course bar recovery without statutory intervention.[4] New Hampshire and New Jersey exclude non-resident alien dependents from the benefit of their respective acts. Twenty-one states include them, but fourteen of these limit either the beneficiaries or the amount payable. In the remaining states, where no statutory provision has been made, the silence of the legislature has in some instances led them to be included by courts or commissions.

[1] *Kennerson* v. *Thames Towboat Co.*, 89 Conn., 367.
Lindstrom v. *Mutual S. S. Co.* (Minn.), 156 N. W., 669.
Stoll v. *Pac. Coast S. S. Co.*, 205 Fed., 169.
West N. J. Trust Co. v. *Phila. & R. R.R. Co.*, 88 N. J. Law, 102.

[2] *Staley* v. *Ill. Cen. R.R. Co.*, 268 Ill., 356.
S. P. Co. v. *Pillsbury*, 170 Cal., 782.

[3] *Kentucky State Journal Co.* v. *Workmen's Compensation Board*, 161 Ky., 562.

[4] *Yugic* v. *Youngstown Sheet & Tube Co.*, 220 Fed., 390. (Applying Ohio laws.)
Petrozino v. *Mutual Liability Co.*, 219 Mass., 498.

IV

THE NOTICE OF INJURY

Importance of Notice of Injury

Every statute requires notice of an injury as a prerequisite to a claim predicated upon it. Such notice is likewise of equal importance for the purpose of providing medical aid where it is required or voluntarily given and as a means of preventing slight injuries becoming serious through infection or lack of attention.

Notice in Disease Cases

Every court which has given attention to the subject declares, in one way or another, that an accident or an injury within the meaning of the various acts is an event sufficiently definite in time and place to be the subject of specific notice. This fact is indicative of the serious difficulty attached to giving requisite or necessary notice with respect to many forms of disability which have gradually become included under the phrase "injury arising in the course of employment." The natural tendency toward a broad application of a remedial statute is accompanied by a native difficulty of definitely describing, limiting, or locating the origin of disorders and disease alleged to be caused or aggravated by accident or injury.

Actual Notice

Notice is usually required to be given in writing, but it is sufficient if actual notice of the accident is had, and this is presumed wherever a foreman, superintendent, or other representative or agent of the individual or corporate employer is actually aware of the accident or injury, or is in possession of facts sufficient to put a reasonable person upon inquiry, which inquiry or undertaking would naturally disclose the fact of injury.[1] But notice must be

[1] *State* v. *District Court*, 129 Minn., 423.
Acherson v. *National Zinc Co.*, 96 Kan., 781.
Troth v. *Millville Bottle Works* (N. J.), 98 Atlantic, 435.
In re *Bloom* (Mass.), 111 North Eastern, 45.
Matwiczuk v. *Am. Car & Foundry Co.* (Mich.), 155 N. W., 412.
Pellett v. *Industrial Comm.* (Wis.), 156 N. W., 956.
Knoll v. *City of Salina* (Kan.), 157 Pac., 1167.
Schmidt v. *Baking Co.* (Conn.), 96 Atlantic, 963.

of such a nature that the employer is not unfairly prejudiced,[1] for it is an element of unusual importance in the prevention and relief of accident, and it may exercise a powerful influence on the seriousness and extent of disability and its legal consequences.

[1] *Malkowsky* v. *Silbervicz*, 1 Conn. Comp. Dec., 136.
Mackay v. *Am. Brass Co.*, 1 Conn. Comp. Dec., 526.
Ehrhart v. *Industrial Accident Comm.* (Cal.), 158 Pac., 193.

THE ASSURANCE OF SYSTEMATIC RELIEF

Insurance Requirements

Every compensation act makes the employers included within it limited insurers against the consequence of work injury within the amounts scheduled. For the payment of any award the defendant employer is primarily liable whether insured or not, and the various states endeavor in a variety of ways to assure compensation payments.

In five states and one territory — Nevada, North Dakota, Oregon, Porto Rico, Washington, and Wyoming— the laws provide for a state insurance monopoly. Nine states — California, Colorado, Maryland, Michigan, Montana, New York, Pennsylvania, Virginia, and Utah — offer three methods of insurance, namely: (1) state fund; (2) private insurance; (3) self-insurance subject to legal safeguards. Eighteen states and one territory — Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Oklahoma, Rhode Island, South Dakota, Tennessee, Vermont, and Wisconsin — give the alternatives of private insurance or regulated self-insurance. In Texas employers may insure either in a private or in a semi-mutual state company as provided in the Act of 1913. Massachusetts allows no alternative to private insurance, while Idaho, Ohio,[1] and West Virginia[1] provide for a choice of either a state fund or controlled self-insurance. In Alaska, Arizona, Kansas, Louisiana, and Minnesota no insurance is compulsory.

Compelling Premium Payments (Ohio)

In some states, like Ohio, the State Industrial Commission may make a penal award to an injured employee whose employer has neither insured his liability nor

[1] Ohio and West Virginia permit self-insurance only after regular contribution has been made to the state fund, which in effect gives monopoly to state insurance.

established his capacity for self-insurance.[1] This right of the State to substantially compel the insurance of the employer's liability was recently sustained by the Supreme Court of Ohio.

Uniformity of Liability Required by National Business

The larger part of business in the United States extends its operations into more than one state. This fact, in connection with a now well-marked tendency to practically realize, by specific obligation, the insurance of the employer's liability, makes it more than ever essential that there shall be greater uniformity in the language of statutory obligation and increasing harmony in construction and interpretation. Every modification or restrictive phraseology of liability, every loose or ambiguous word of obligation, every novel or indefinite term carrying hidden possibilities of judicial construction, adds a higher margin of premium payment to cover the necessary risks of contingent insurance liability. Compensation statutes create insurance contracts and should therefore possess a meaning as definite and certain as human intelligence guided by experience and selected phraseology of fixed meaning can make them.

Costs of Compensation Insurance

Minimum insurance rates have been established by the rating boards of the various states for the purpose of assuring a sound actuarial basis for liability companies. The rates, which run from about ten cents for clerical workers to five and six dollars and even higher for such hazardous occupations as railroad operating, are based on each hundred dollars of the weekly payroll, usually averaged over the year, and constitute the annual premium. At the present time, the several states vary considerably in the premium rates as well as in the

[1] Ohio Compensation Act, 103 Ohio Laws, page 72, Supplemental Act, Section 27.

amounts of compensation.[1] Moreover, the costs of compensation insurance, a considerable item for industry at best, have been in many instances increased by indefinite and ambiguous legislation.

[1] The following table shows the amount of compensation which would be received under the several state compensation laws as of January 1, 1919, in case of death or of loss of major hand at the wrist sustained by a married man, thirty-five years of age, receiving $15 a week, and having a dependent wife, thirty years of age, and three normal dependent children, three, six, and nine years of age. It has been assumed that the loss of the hand results in a total disability of fifteen weeks and a subsequent partial disability of 50 per cent of life.

COMPENSATION PAYABLE UNDER STATE LAWS FOR DEATH AND FOR LOSS OF HAND

State	Compensation payable under state laws for		State	Compensation payable under state laws for	
	Death	Loss of hand		Death	Loss of hand
Alaska	$4,800.00	$2,640.00	Nevada	$11,230.22	$1,412.50
Arizona	3,000.00	{ 112.00 [1] 4,000.00	New Hampshire	2,250.00	{ 97.50 [1] 1,173.75
California	2,340.00	2,232.75	New Jersey	2,350.00	1,222.50
Colorado	2,347.50	780.00	New Mexico	2,525.00	825.00
Connecticut	2,440.00	1,170.00	New York	11,205.22	2,440.00
Delaware	2,125.00	1,185.00	Ohio	4,320 00	1,640.00
Hawaii	2,908.00	1,830.00	Oklahoma		1,500.00
Idaho	3,400.00	1,237.50	Oregon	13,480.92	1,787.89
Illinois	3,135.00	1,599.00	Pennsylvania	2,575.00	1,312.50
Indiana	2,350.00	1,237.50	Porto Rico	[2]	[3]
Iowa	2 350.00	1,125.00	Rhode Island	2,250.00	{ 472.50 [1] 1,612.50
Kansas	2,340.00	1,125.00	South Dakota	3,000.00	1,237.50
Kentucky	3,341.25	1,462.50	Texas	3,240.00	1,350.00
Louisiana	2,575.00	1,237.50	Utah	2,732.25	1,137.50
Maine	2,250.00	{ 937.50 [1] 1,593.75	Vermont	1,855.00	1,162.50
Maryland	3,202.50	1,125.00	Virginia	2,350.00	1,125.00
Massachusetts	4,000.00	{ 635.71 [1] 3,135.71	Washington	10,354.20	1,385.00
Michigan	2,250.00	1,125.00	West Virginia	9,156.78	1,012.50
Minnesota	2,575.00	1,350.00	Wisconsin	3,235.00	2,340.00
Montana	3,075.00	1,125.00	Wyoming	3,000.00	935.20
Nebraska	3,600.00	1,500.00	United States	12,486.84	8,433.51

[1] Includes compensation for partial disability.

[2] Maximum $3,000 to $4,000, graded according to earning capacity of employee and number of dependents.

[3] Maximum $2,500, minimum $1,300; graded in proportion to rate of wages earned at time of injury.

— *U. S. Bureau of Labor Statistics Monthly Labor Review, Vol. VIII, No. 3.*

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VI

ACCIDENT AND DISEASE

Definitions of "Accident"

The popular conception of an "accident" is probably much narrower than the definition which that term now receives in the construction of compensation legislation. The fact is that the original conception has been greatly modified and extended by the adoption of broader statutory language and by administrative construction. The English compensation act, which served as a model for much of American legislation, created its fundamental liability by the phrase "personal injury by accident arising out of and in the course of employment."[1] That phrase is identically or substantially contained in the acts of Alaska, Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Missouri, New Mexico, Nebraska, Nevada, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Porto Rico, Rhode Island, South Dakota, Utah, Tennessee, Vermont, Virginia, and Wisconsin. The qualifying phrase "by accident" is omitted in the remaining acts.

In every state an injury to be compensable must happen in the course of the employment and in all but five states,—North Dakota, Ohio, Pennsylvania, Texas, and Washington,—it must arise out of or result from the employment. Washington and Wyoming omit the word "accident", the former qualifying the term "injury" by the phrase "resulting from some fortuitous event as distinguished from the contraction of disease," the latter using the phrases "injuries sustained in extra hazardous employment," "as a result of their employment," while at work on their employer's premises or where their employer's business requires their presence, and subjects them to extra hazardous duties incident to the business.

Occupational diseases are now compensable in California, Connecticut, Hawaii, Massachusetts, Wisconsin, and for civil employees of the United States.

[1] 6 Edw. VII, Cap. 58, Sec. 1. (1)

Effect of Modifications

The effect of these verbal modifications of the parent act, the broad construction of which already permitted it to cover many forms of infection by disease and even remote effects of injury, has been to greatly extend the application of the act from what are popularly considered "accidents" to many forms of sickness and to liability for not merely the torts, but the crimes of fellow-employees and third persons beyond the control or reach of the employer.

British Definition of "Accident"

The term "accident" was unsatisfactorily defined in the first English compensation act of 1897, in the opinion of leading commentators, until the decision by the House of Lords in 1903, in the case of Fenton *v.* Thorley & Company (1903, A.C. 443). In that case Lord MacNaghten said:

> "I come therefore to the conclusion that the expression 'accident' is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Separation of Accident and Disease in British Acts

In a further decision of the House of Lords in the case of Brinton's Limited *v.* Turvey (1905, A.C. 230) it was held that an infection to the eye of a workman from anthrax in the wool handled by him was "personal injury by accident." All the Law Lords, however, took occasion to expressly emphasize their view that the decision must not be regarded "as involving the doctrine that all diseases caught by a workman in the course of his employment are to be regarded as accidents." In the succeeding English legislation of 1906 compensation was allowed for occupational disease, which was, however, made the subject of a separate statute in which twenty-four diseases were enumerated and defined, others being added thereto by an official board of physicians upon the approval of the Secretary of State.

American Variations of "Accident"

In enacting the identical or substantial language of the English statute, some states follow it closely as in Michigan, narrow it somewhat as in Nebraska, where it seems to require extraneous physical injury,[1] or in New York construe it even more liberally through the Industrial

[1] *Johansen* v. *Union Stock Yards Co.*, 99 Neb., 328.

Commission, which holds it to be a compensable accident when a street railway process server dies from gangrenous diabetes alleged to result from a fellow-passenger treading upon his toes while the decedent was returning to his place of employment on a street railway car of the company which employed him.[1]

Proof of Accident

The occurrence of an accident is generally held to be a mixed question of law and fact,[2] but its meaning when applied to ascertained facts is a question of law.[3]

Extension of Coverage by Massachusetts

The courts of Massachusetts point out very clearly the extensive increase of liability where compensation is awarded, as in that state, for "personal injury" as distinguished from "personal injury by accident." "There are no conditions," says the Supreme Court of Massachusetts, "which warrant a judicial interpretation of the phrase 'personal injury' in the act as meaning the same as 'personal injury by accident' or as excluding from the scope of 'personal injuries' those instances where a diseased physical condition may have invited, or rendered, the employee unusually susceptible to 'personal injury.'"[4] The word "injury" in the Massachusetts statute will include whatever lesion or change in any part of the human system produces harm or pain or a lessened faculty of the natural use of any bodily activity or capacity.[5]

Exclusion of Disease by Ohio, Michigan, Connecticut, California, and Iowa

Yet the Supreme Courts of Ohio,[6] Michigan,[7] and Connecticut[8] have held that "personal injury," "even without the qualifying word 'accident,'" excludes occupational disease, the administrative boards of California[9] and Iowa[10]

[1] *Brown* v. *Richmond Light & R.R. Co.*, The Bulletin, N. Y. State Industrial Commission, Vol. 1, No. 6, page 12.

[2] *Bryant* v. *Fissell*, 84 N. J. Law, 72.

[3] *Fenton* v. *Thorley & Co.* (1903), A. C. 443.

[4] In re *Madden*, 222 Mass., 487.

[5] In re *Burns*, 218 Mass., 8. In re *Madden*, 222 Mass., 487.

[6] *Industrial Com.* v. *Brown*, 92 Ohio State, 309.

[7] *Adams* v. *Acme White Lead & Color Works*, 182 Mich., 157.

[8] *Miller* v. *Am. Steel & Wire Co.*, 90 Conn., 349.

[9] 1 Cal. I. A. C. Dec., No. 5, p. 11.

[10] Opinion Special Counsel to Iowa Industrial Com. (1915), page 26.

reaching the same conclusion with respect to the same language.

The Massachusetts Supreme Court holds to the contrary, including lead poisoning as personal injury,[1] and the Wisconsin Court holds typhoid fever contracted from drinking water supplied by the employer to be a "personal injury,"[2] but the Supreme Court of Minnesota took the opposite view from that adopted by the Wisconsin courts in a case involving typhoid fever infection.[3]

California, by an amendment in 1918, definitely included occupational diseases within the scope of the compensation law.

It appears to be generally accepted that injuries are to be compensated irrespective of pre-existing tendencies or the subnormal condition of the injured workman,[4] provided that the immediate injury, whether accelerating or exaggerating the pre-existing condition, proximately arises from the employment.[5] In other words, the cases show that the courts are coming to make a definite distinction between industrial diseases and disease resulting from accident.

[1] *Johnson* v. *London Guarantee & Accident Co. Ltd.*, 217 Mass., 388.

[2] *Bennen* v. *New Dells Lumber Co.* (Wis.), 154 N. W., 640.

[3] *State* ex rel *Faribault Woolen Mills Co.* v. *District Court of Rice County*, 164 N. W., 810.

[4] *Mazzarisi* v. *Ward*, 156 N. Y. Supp., 964.
Schmidt v. *O. K. Baking Co.*, 1 Conn. Comp., 683.
Forrest v. *Roper Furniture Co.*, 187 Ill. App., 504.
In re *Madden*, 222 Mass., 487.
Voorhees v. *Smith Schoonmaker Co.*, 86 N. J. Law, 500.
Hills v. *Oval Wood Dish Co.* (Mich. Comp. Cases, 1916, p. 11).
Gurney v. *Los Angeles Soap Co.*, 1 Cal. I. A. C. Dec., 163.

Fundamental expressions of these principles are found in *Hughes* v. *Clover, Clayton Co.*, 25 T. L. R., 760 (1909), the Law Lords holding

> "that an accident arises out of the employment when the required exertion producing the accident is too great for the man undertaking the work, whatever the degree of exertion or the condition of health."
>
> The Massachusetts Supreme Court construing the State Act represents the advanced application of the English ruling:
>
> "There is nothing said in the Act about the protection being confined to the healthy employee. The previous condition of health is of no consequence in determining the amount of relief to be afforded. It is the injury arising out of the employment and not of disease for which compensation is to be made. Yet it is the hazard of the employment acting upon the particular employee in his condition of health and not what the hazard would be if acting upon a healthy employee or upon the average employee."
>
> (In re *Madden*, 222 Mass. Feb., 1916.)

[5] *Kill* v. *Industrial Commission* (Wis.), 152 N. W., 148.
Masich v. *N. W. R.R. Co.*, 2 Cal. I. A. C. Dec., 545.
Flotat v. *Union Hardware Co.*, 1 Conn. Comp. Dec., 5.
Ruth v. *Witherspoon-Englar Co.* (Kan.), 157 Pac., 403.

Causes of Accident

It is not necessary that the injury should arise from an extraneous cause.[1] It may be caused by nervous shock without external physical change.[2] It may result from the wilful or even criminal act of another, as where a watchman is wounded while defending his employer's property,[3] or a foreman is assaulted because of the administration of a reprimand for doing work improperly,[4] or a mill superintendent murdered by an ejected person.[5]

Further Broadening of the Liability of the British Act

The restrictions diminished by the elimination of the word "accident" from the definition of liability are yet further lessened by striking out the phrase "out of" and permitting liability to remain merely for injuries received "in the course of employment." "Many accidents occur in the course of, but not out of, the employment; but I am unable to think of any that could arise out of and not also in the course of the employment." These words by Justice Farwell[6] express the effect of the elimination of "out of" in many state acts, for it is obvious that an injury may be received in the course of employment while the cause is unrelated to such employment.

Elimination of "Out of"

The phrase "out of" has been generally held to fix the cause or source of the accident or injury, while the term "in the course of" defined the time, place, and circumstance of its occurrence. Numerous decisions of the courts respecting statutes carrying this conjunctive phrase emphasize the fact that mere injury while performing a duty of service gives no claim for compensation unless an essential relation is established between the employment and the injury. This requirement, of course, fails when it is merely necessary to show that the injury arises during

[1] *McMurray* v. *Little*, etc., 3 N. Y. St. Dept. Rep., 395.

[2] *Reich* v. *City of Imperial*, 1 Cal. I. A. C. Dec., 337.
For an opposite view see *Visser* v. *Mich. Cabinet Co.*, Opinions Mich. Industrial Board, Bulletin 3, page 24.

[3] *Hume* v. *Knickerbocker Portland Cement Co.*, 153 N. Y. Supp., 1151.

[4] In re *Reithel* (Mass.), 109 N. E., 951.

[5] In re *Employers' Liability Ins. Corp.*, 215 Mass., 497.
Hartnett v. *Steen*, 216 N. Y., 101.

[6] *Leach* v. *Oakley, Street & Co.*, 1911, 4 B. W. C. C., 98.

"the course" of the employment. It may thus be caused through the violence of a fellow-workman or a stranger,[1] but not by "horseplay."[2] The Ohio Industrial Commission awarded compensation to the dependents of a stenographer who was feloniously shot and killed by a jealous fellow-employee while taking dictation from her employer.[3]

Special Liability Suggested by Connecticut Commission

"Injuries during the course of employment" are beginning to include, and have already by precedent included, forms of infection or contagion which are incidental rather than inherent in employment. This tendency, necessarily reflected in an increasing severity of physical examination in the jurisdictions in which it is most evident, doubtless inspired the suggestion of the Connecticut Commission in 1915, that persons suffering from inherent physical defects, making them a peculiar hazard, shall be permitted to make special stipulations with regard to compensation, subject to the approval of the Commission, as a practical means of preventing their exclusion rom employment.

Proximate Causes of Injury

In substantially all state jurisdictions the burden of proof rests on the claimant to show that the accident or injury recited is the proximate cause of the alleged disability or death, but "proximate cause under the law of negligence always has to be traced back to the conduct of responsible human agencies; under the compensation act the words 'proximate cause by accident' in terms relate to a physical fact only, namely, an accident. Hence if the injury or death can be traced to physical cause not too remote in time or place to the accident, then such injury or death was proximately caused by the accident, irrespective of any element of reasonable anticipation. The term 'proximate' was, no doubt, used to exclude physical causes so remote in time and place, or both, as to make them of doubtful value in tracing the relation between cause and effect."

[1] *Stertz* v. *Industrial Insurance Comm.* (Wash.), 158 Pac., 216.
State v. *District Court of Koochiching County* (Minn.), 158 N. W., 713.

[2] *Hulley* v. *Moosbrugger*, 88 N. J. Law, 16.
Pierce v. *Boyer-Van Kuran Lumber & Coal Co.*, 99 Neb., 32.

[3] *Anna Schwenlein, claimant.* Bulletin Industrial Commission of Ohio, Vol. 1, No. 7, page 136.

Pre-existing Disease or Injury

The view of the Wisconsin Supreme Court[1] seems an excellent statement of the substantial principle. It applies equally to all forms of disease of physical consequence where there is a causal connection between them and the injury. Inasmuch as the employer is said to take workmen as he finds them, he becomes responsible for disabilities which are the direct result of an injury or accident aggravating a previous physical condition. Thus compensation is allowed for death caused through an infected heel blister poisoning the blood stream and causing Bright's disease,[2] or death from pneumonia where the power of resistance has been reduced by an occupational strain,[3] or death following an inflammation of a pre-existing cancer due to an accidental blow,[4] or where a weak heart is impaired by the muscular exertion of the work.[5] Where the causal connection is complete the principle applies, although merely accelerating pre-existing disease, or where the injury ultimates in insanity or suicide. If, however, a second independent cause intervenes at any point the causal chain is, of course, broken and the liability ceases. The question is always one of fact.

Aggravation of Injury

The aggravation of the injury or disability by the conduct of the workman carelessly, negligently, or unreasonably preventing cure or making the condition worse is ground for stopping compensation.[6] The too early use of a broken limb, resulting in a second injury to it, will not permit a second compensation.[7] A second disability produced by awkwardness or clumsiness as a natural result of the first is, however, further compensable.[8] The prolongation of working incapacity due to the use of intoxi-

[1] *City of Milwaukee* v. *Industrial Comm.*, 160 Wis., 238.

[2] *Wheadon* v. *Red River Lumber Co.*, 1 Cal. I. A. C. Dec., 640.

[3] *Merritt* v. *Travellers' Ins. Co.*, 2 Mass. Workmen's Com. Cases, 635.

[4] *Rose* v. *City of Los Angeles*, 2 Cal. I. A. C. Dec., 574.

[5] In re *Madden*, 222 Mass., 487.

[6] *Larke* v. *John Hancock Life Ins. Co.*, 90 Conn., 303.
Peck v. *San Francisco-Oakland Terminal Ry.*, 1 Cal. I. A. C. Dec., 462.
Chiesa v. *United States Crushed Stone Co.*, Bulletin 1 (Ill.), page 82.
Twoomey v. *Royal Indemnity Co.*, 2 Mass. Workmen's Compensation Cases, 540.

[7] *Woodruff* v. *Peterson*, 1 Cal. I. A. C. Dec., 516.

[8] *Block* v. *Mutual Biscuit Co.*, 2 Cal. I. A. C. Dec., 274.

cating liquors is not compensable.[1] The Supreme Courts of Wisconsin and Washington[2] have held the employer liable for death or disability resulting from the professional incompetence of the physician supplied by him. Death resulting from an operation necessitated by the original injury is compensable.[3]

Refusal of Medical Instruction or Recommendation

As a rule, prolonged disability due to disobedience of the physician's instruction is not compensable.[4] The question of whether or not a workman is unreasonable in refusing to submit to an operation advised by a physician to cure disability or save life must rest upon the circumstances of the case.[5] Thus it has been held by a high English authority that it is not unreasonable to refuse to submit to an operation involving risk of life.[6] On the other hand, it has been held unreasonable to refuse to submit to a minor operation to restore the use of a finger or a hand in a skilled trade.[7]

Hernia

Hernia is a special subject of decision and administrative rule. As a result of many difficult claims and considerable fraud the authoritative rule seems to be that there will be a strong presumption against a hernia directly arising from an accidental injury which will not be overcome by merely showing that hernia is coincidental with some exceptional exertion.[8] Decisions respecting hernia are by no means harmonious.[9] The Oregon Commission

[1] *Kearns* v. *New London*, etc., 1 Conn. Comp. Dec., 225.

[2] *Ross* v. *Erickson Construction Co.*, 89 Wash., 634.
Paulak v. *Hayes*, 162 Wis., 503.
In same connection, see modified view of Minn. Court, *Vita* v. *Dolan*, 155 N. W., 1077.

[3] *Canturel* v. *Travellers' Ins. Co.*, 2 Mass. Workmen's Compensation Cases, 246.

[4] *Weaver* v. *Eyster & Sone*, 1 Cal. I. A. C. Dec., 563.

[5] *Jendrus* v. *Detroit Steel Products Co.*, 178 Mich., 265.
Lesh v. *Illinois Steel Co.* (Wis.), 157 N. W., 539.

[6] *Tutton* v. *Owners of S.S.* "*Majestic*," 2 Butterworth's Compensation Cases, 346 C. A. (1910).

[7] *Slater* v. *New Britain Trap Rock Co.*, 1 Conn. Compensation Decisions, 501.

[8] *Jost* v. *Gen. Electric Co.*, 1 Cal. I. A. C. Dec., 527.
Kozlowski v. *Illinois Steel Co. Rep.*, Wis. Industrial Commission, 1915, page 19.

[9] In comparison with the above, see *Bell* v. *Hayes-Ionia Co.* (Mich.), 158 N. W., 179.
Also *Poccardi* v. *Public Service Commission* (Minn.), 84 S. E., 242.

requires hernia claimants to provide affidavits establishing the non-existence of hernia before the accident.[1] The Washington Commission requires proof that hernia is of recent origin, is accompanied by pain, was immediately preceded by an accidental strain and did not previously exist. The Nevada Commission has likewise adopted strict definitive rules.

Disfigurement

Injuries causing mutilation or disfigurement accompanied by disability to pursue the previous or other occupation have received considerable legislative and judicial attention. Eleven states have made statutory provisions confined as a rule, however, to compensation for mutilation of the head or features.[2] The acts of Vermont, Kentucky, and Idaho require that for the purpose of compensation mutilation must cause lessened capacity to secure employment. The Iowa Commission in the absence of a statutory provision held it would allow compensation only if it could be shown that the working capacity was affected. The New York courts share this view; the Industrial Commission, however, exercises certain discretionary powers;[3] the Supreme Court of Illinois modifies it.[4]

Occupational Disease as an Accident

In Great Britain certain forms of occupational disease resulting from infection, like anthrax, were held to be a "personal injury by accident."[5] By later legislation all occupational disease is defined in a separate statute to which additions are made by order of the Secretary of State.[6] In our own legislation there is now a marked tendency to require separate provision for such disease and to deny it compensation as an "accident." The Supreme Courts of Connecticut,[7] Michigan,[8] and Ohio[9] have held their respective acts do not include occupational disease,

[1] Oregon Industrial Accident Board, 1st Annual Rept., page 18.

[2] Colo., Ill., Md., Mo., Ky., La., Nev., N. Y., S. Dak., Vt., Wis.

[3] *Shinnick* v. *Clover Farms Co.*, 154 N. Y. Supp., 423.

[4] *Waters* v. *Kroehler Mfg. Co.*, 187 Ill. App., 548.

[5] *Brinton's Ltd.* v. *Turvey* (1905), A. C., 230.

[6] British Workmen's Compensation Act, 1906, Section 8, Subsections (2) (6), and Secretary of State's orders made thereunder.

[7] *Miller* v. *American Steel & Wire Co.*, 90 Conn., 349.

[8] *Adams* v. *Acme White Lead & Color Works*, 182 Mich., 157.

[9] *Industrial Commission* v. *Brown*, 92 Ohio State, 309.

although the term "injury" and not "accident" qualifies the statute of each of these states. The Supreme Court of Massachusetts, on the contrary, has held that the term "personal injury" includes occupational disease.[1] The construction and practice of administrative commissions indicates an increasing tendency to allow compensation for many forms of disease contracted during employment without requiring a clear proximate relation thereto to be established. The courts, however, appear to be drawing a distinction between industrial diseases and disease resulting from accident, allowing compensation in the latter class of cases and denying it in the former unless definitely included by the terms of the statute.

[1] *Johnson* v. *London Guaranty & Accident Co. Ltd.*, 217 Mass., 388

VII

"MISCONDUCT" BY EMPLOYER AND EMPLOYEE

Various Definitions of Misconduct

The one generally recognized bar to recovery of compensation for occupational injury is "serious and wilful misconduct." This is variously defined in different acts or qualified by such further phrases as "self-inflicted injury," "wilful intoxication," or "the violation of the safety rule made for the employee's protection." The major phrase is taken from the English act, where it does not bar recovery if the injury received results in "serious and permanent disability or death."[1]

Misconduct of Employee as a Defense

It is an affirmative defense which the employer asserting must establish.[2] As a general rule, if there be any serious element of doubt that the serious and wilful misconduct of the employee occasioned his injury, compensation will be allowed. Since the negligence of the employee is in itself no obstacle to recovery under the compensation theory, the phrase "serious and wilful misconduct" means much more than even "gross negligence."[3]

Practical Construction of Misconduct

It means deliberate performance of an act with reckless disregard of the consequences.[4] The word "serious" applies to the misconduct of the employee and not to the consequence of his injury.

Intoxication as Misconduct

Except where the statute specifically provides, intoxication amounting to drunkenness does not in itself constitute such "wilful misconduct" as will bar recovery, and

[1] British Workman's Compensation Act (1906), Sec. 1 (2), paragraph (*c*).

[2] *Ruprecht* v. *Red River Lumber Co.*, 2 Cal. I. A. C. Dec., 864.
Sirica v. *Scovill Mfg. Co.*, 1 Conn. Compensation Decisions, 171.

[3] In re *Nickerson*, 218 Mass., 158.
In re *Burns*, 218 Mass., 8.
Neradjic v. *Northwestern Iron Co.*, 154 Wis., 97.

[4] *Hoffemayer* v. *United Film Co.*, 1 Cal. I. A. C. Dec., 620.

the defendant must establish the existence of the condition by affirmative evidence.[1] Distinction is made between the wilful taking of liquor and its effects, which, it is considered, may be aggravated by pre-existing abnormal conditions affecting an individual in a manner not intended or anticipated.[2] Generally speaking, even where drunkenness is shown, the defendant must make clear, not merely that the applicant was intoxicated at the time of injury, but that such condition was either the exclusive or the strongly contributing cause of injury.[3]

Violation of Safety Rules as Misconduct

The disobedience by the employee of a reasonable rule designed and qualified to secure his safety becomes "serious and wilful misconduct" only when such rule has been clearly brought to the attention of the injured employee and the employer has not tacitly tolerated its violation.[4] The disobedience itself must be wilful.

Various Statutory Provisions

Our statutes vary widely as to what misconduct shall bar recovery of compensation. Arizona, Illinois, Montana, and Utah do not penalize even the gross fault of the employee. The great majority of the states, however, bar recovery for any injury either "wilfully" or "intentionally" inflicted. In twenty-nine states recovery is barred if the injury is due to intoxication. In New Hampshire, Louisiana, Oklahoma, Kansas, Indiana, Tennessee, Vermont, and West Virginia the removal of safety appliances or the violation of a safety regulation may bar recovery. In about a dozen states "wilful misconduct" bars recovery.

This lack of a uniform standard or definition for penal misconduct is reflected in the decisions of both courts and industrial commissions, which exhibit reluctance to restrict relief, especially to dependents. But it is highly essential that in the interest of the worker as well as in justice to the employer a strong effort should be made to maintain an intimate relation between prevention and relief.

[1] *Hewitt* v. *Red River Lumber Co.*, 2 Cal. I. A. C. Dec., 286.
Ruprecht v. *Red River Lumber Co.*, 2 Cal. I. A. C. Dec., 864.

[2] *Summerville* v. *De Bella & Co.*, 2 Cal. I. A. C. Dec., 122.

[3] *American Ice Co.* v. *Fitzhugh* (Md.), 97 Atlantic, 999.

[4] *Cleveland* v. *Hastings*, 2 Cal. I. A. C. Dec., 15.
Reimers v. *Proctor Pub. Co.* (N. J.), 89 Atlantic, 931.

Misconduct of Employer

In nine states the employer may be sued if the injury of the employee is due to gross negligence or wilful misconduct of the employer.[1] In Ohio and Oregon an employer may be heavily penalized through an action brought by the employee if he violates safety provisions, in Kentucky if he illegally employs minors. In Washington and West Virginia, in addition to his compensation, the employee may sue for excess damages if his injury is due to his employer's deliberate intention. It would therefore seem that the employee's misconduct should under like circumstances be more clearly defined and equally penalized.

[1] Cal., Ky., Md., Ohio, Ore., Tex., Utah, Wash., W. Va.

VIII

THE EXCLUSIVENESS OF COMPENSATION

Compensation as Complete Substitute for Employer's Liability

Compensation acts are now generally held to be substitutional for, and not supplementary to, the system of employers' liability. It therefore follows that as between employer and employee who have accepted this mode of regulating their relation with respect to provisions for work injuries, the remedy provided excludes pursuit of any other.[1]

Election after Injury Law of New Hampshire and Arizona

In all elective states, save New Hampshire and Arizona, the employee must choose between compensation and common-law remedies before injury, and is bound in any subsequent action by this choice. The right of the employee to choose his remedy after the injury evidently does not induce employers to accept compensation readily, for in New Hampshire but comparatively few employers have so elected.

Effect of Election by Employer

In twenty-five states and Porto Rico the acceptance of compensation by the employer compels the employee who rejects it to meet, in an action at law, all the common-law defenses.[2] Except for the states enumerated, suits at law may be brought against the employer only under circumstances which give them the nature of penal remedies for gross or wilful acts of negligence.[3]

[1] *Kennerson* v. *Thames Towboat Co.*, 89 Conn., 367.
Smale v. *Wrought Washer Mfg. Co.*, 160 Wis., 331.
King v. *Viscoloid Co.*, 219 Mass., 420.
McRoberts v. *National Zinc Co.*, 93 Kan., 364.
State v. *Mountain Timber Co.*, 75 Wash., 581.

[2] Colo., Conn., Del., Ill., Ind., Iowa, Kan., Ky., La., Me., Mass., Mich., Minn., Mo., Mont., Neb., Nev., N. H., N. Dak., Ore., R. I., Tenn., Vt., Va., Wis.

[3] Thus an employer may be sued if there has been a violation of the safety laws in Oregon and Ohio; if he illegally employs minors in Kentucky, and in quite a number if his insurance is defaulted or if his risk is not covered, as required.

Suits against Third Parties. The Washington Law

Generally speaking, no act deprives an employee of the right to bring an action at law against third parties or strangers causing his injury while at work; but, by a decision of the Supreme Court of the United States sustaining a decision of the court of last resort of Washington, a brewery employee, injured in the brewery yard through the negligent movement of its cars by a railroad company, was held to be excluded from bringing a suit against the carrier.[1]

[1] *Northern Pacific R.R. Co.* v. *Meese*, 36 Sup. Ct. Rep. 223.

IX

THE ADMINISTRATION OF COMPENSATION ACTS

Administration by Courts or Commissions

Our compensation acts are administered either (1) through permanent boards or commissions, with an ultimate right of appeal to the courts on questions of law, or (2) through inferior state or county courts acting as arbitrators. This plan may be varied, through the appointment by the court or by the parties at interest, of individual or committee arbitrators. No fewer than twenty-nine states,[1] Hawaii, and Porto Rico administer their acts through commissions.[2]

Settlement of Claims between the Parties

In twenty-seven states and territories employer and employee are encouraged to settle claims between themselves, subject to the approval of some public board or officer. All the available evidence indicates that this method, more than any other, is speeding the adjustment of claims and lessening the expense involved. Where state insurance monopoly exists this course may not be pursued, since the State itself is interested in the pecuniary terms of the settlement.

Commission Administration

Where the parties are unable to agree between themselves, the states administering through commissions provide for hearings by single commissioners, referees, or subordinate committees, with the right of appeal to the commission. Connecticut vests control in five commissioners, each administering the act within his own district, which is identical with the Congressional subdivisions of the state. States unprovided with boards or commissions adjudicate disputed cases through the inferior courts, or through officers authorized to adjust them.

[1] Cal., Colo., Conn., Del., Idaho, Ill., Ind., Iowa, Ky., Me., Md., Mass., Mich., Mont., Nev., N. Y., N. Dak., Ohio, Okla., Ore., Pa., S. Dak., Tex., Utah, Va., Vt., Wash., W. Va., Wis.

[2] A single commissioner in Ia., Neb., S. Dak., Vt., and W. Va.

Various Duties of Commissions

To the various administrative bodies are likewise committed the settlement of many delicate questions involving adjustment of medical and hospital fees, and the determination of the adequacy of surgical, medical, and nursing service. To this end they often need, but are not always provided by law with, medical advisers.

Instalment Payments and Commutation

With the exception of Wyoming, every state requires compensation payment to be made in periodical instalments. It is obvious, however, that circumstances may arise which make it desirable that lump sum payments be permitted. The practise ought to be strictly safeguarded, or the very purpose of compensation may be defeated. Most of the states, therefore, permit applications for commutation payments to be made on the motion of either party or at the suggestion of a court or a commission. In Wisconsin, Rhode Island, Maine, Massachusetts, Michigan, Colorado, Illinois, Kansas, Virginia, Kentucky, and Missouri lump sum payments cannot be made until six months after compensation is awarded. In Indiana and Massachusetts, however, it may be granted at any time on behalf of minors.

Revision of Awards

The various administrative bodies are likewise authorized to revise awards in cases where the condition of disability or dependency has so changed as to necessitate re-examination and award in conformity with new conditions. These provisions provide protection against fraud and secure additional aid where circumstances warrant it.

Validity of Commission Administration

These various administrative functions have been examined in a variety of proceedings and uniformly sustained by judicial opinion as a valid exercise of the legislative police power.[1]

[1] *Cunningham* v. *N. W. Improvement Co.* (Mont.), 119 Pac., 554.
Borgnis v. *Falk*, 147 Wis., 327.
State v. *Creamer*, 85 O. St., 349.
Mackin v. *Detroit-Timken Axle Co.*, 153 N. W., 49.
Pigeon v. *Employers' Liability Assurance Corp.* (Mass.), 102 N. E., 932.
Western Metal Supply Co. v. *Pillsbury* (Cal.), 156 Pac. 491.
Hunter v. *Colfax Con. Coal Co.* (Iowa), 154 N. W., 1037.
Hawkins v. *Bleakly*, 220 Fed., 378. Affirmed, 37 Sup. Ct. Rep., 256.

Right of Appeal

While all acts provide opportunity of appeal for both employer and employee respecting questions of law and constitutional right, the findings of administrative commissions are usually conclusive when supported by evidence, although that evidence be not wholly satisfactory.[1] But where the ultimate findings of fact by an administrative body are based upon conclusions of law, they are subject to court review, in so far as they involve the determination of such questions of law.[2]

An exceedingly important application of the compensation principle is found in the act of Congress of October 6, 1917, which provides compensation for death or disability resulting from personal injury suffered or disease contracted in the line of duty by any commissioned officer or enlisted man, or by any member of the army or navy nurse corps (female) of the United States, when employed in active military service.

[1] *Blanding* v. *Sayles*, 21 R. I., 211.
In re *Septimo*, 219 Mass., 430.
Western Indemnity Co. v. *Pillsbury*, 170 Cal., 686.
Bruce v. *Taylor* (Mich.), 158 N. W., 153.
Rhyner v. *Hueber Bldg. Co.*, 156 N. Y. Supp., 903.
City of Milwaukee v. *Industrial Comm.*, 160 Wis., 238.
State v. *District Court* (Minn.), 156 N. W., 120.
Armour & Co. v. *Industrial Board*, 273 Ill., 590.

[2] In re *Rheinwald*, 153 N. Y. Supp., 598.
Appeal of Hotel Bond Co., 89 Conn., 143.
People v. *McCue*, 150 Cal., 195.
Hulley v. *Moosbrugger*, 88 N. J. Law, 161.

X

CONCLUSIONS AND SUGGESTIONS

A sympathetic examination of the legal structure and administration of compensation acts in the United States suggests certain definite conclusions. There can be little argument over the fundamental principle of compensation, namely: The substitution of a definite and certain measure of relief for the former uncertainties of redress through litigation. The compensation principle is in line with the best conceptions of equitable industrial relationships. However, in its practical application by a large number of independent jurisdictions and in its interpretation by various boards and courts, there has been, as this report clearly shows, a vast amount of conflict. Sudden subversion of long established theories of liability, the rapid extension of novel principles of obligation and procedure, the inevitable confusion of differing legislative policies dealing with a new and unfamiliar subject amid the play of many political forces and the lack of domestic experience, naturally express themselves in contradictory thought and action. Uncoordinated and extensive amendment of the various acts has not bettered this condition. Considering the widespread revolution in the thought and tradition of Bench and Bar, and the hitherto slowly changing legal relations of employer and employee, there is little occasion for surprise at this inharmony of enactment and interpretation. But this conflict of theory and action ought steadily to diminish. To accomplish this, it is obvious that at least an organized effort must be established toward a concert of thought and action by the state commissions.

Common information is the seed of common opinion. It is therefore suggested:

First: The states, through appropriate representatives, should undertake, under expert guidance, the immediate establishment of a permanent, scientific, uniform system of compensation statistics that all may know and apply the progressive experience of each. This would properly include provision for separate publication of judicial

decisions relating to the compensation principle, together with substantial memoranda of all contested cases determined by administrative bodies. Thus there would be assured a set of controlling facts which, in association with collated judicial opinions, would secure an accurate and convenient legal record of the operation of each act.[1]

Second: Availability of such data would be a great step toward the establishment of definite insurable standards of liability. The interests of neither employer nor employee are served by ambiguous expressions of legal obligation which necessarily make for precautionary premium rates to safeguard against contingencies of judicial interpretation.

Third: Compilation of systematic and uniform accident data would exercise a powerful influence on conventional legislative notions of the relative hazard of occupations, and permit the just extension of the compensation principle to many workers now arbitrarily excluded from its terms.

Fourth: Clear discrimination, in legal definition, between "occupational disease," "accident," and "injury" would tend to clarify liability, harmonize administrative decisions, and minimize contested claims.

Fifth: Experience justifies the further simplification of administrative procedure by uniformly encouraging direct settlement between employer and employee of all claims, this practice to be conditioned by adequate safeguards for the protection of the employee.

Sixth: In view of the general conclusion of state courts and the Supreme Court of the United States that the compensation system is intended to be and should be substitutional for and not supplemental to employer's liability, it is suggested, as a great step toward uniformity in substance and procedure, that a fixed tendency be established toward an exclusively compulsory compensation system, thus eliminating many technical questions relating to whether or not employer or employee had made an election. The elective system in all its legal forms is intended to compel, under the penalty of abrogated defenses, an adoption of compensation, and leaves

[1] The State of New York has just published the compensation decisions of its courts from 1914 to 1916. Department of Labor, New York State Special Bulletin No. 81, March, 1917. Court Decisions on Workmen's Compensation Law. Decisions have also been published by several other states; for example, Massachusetts, Maine, Maryland, Michigan, Minnesota, and West Virginia.

to employer and employee in the vast majority of cases an option without a choice.

The present state of the subject and the great number of independent agencies in operation, influenced by differing local conditions, make it difficult to more than suggest the establishment of tendencies which, once set in motion, undoubtedly would stimulate common action, as accurate and systematized information reacted upon popular and legislative opinion.

APPENDIX—Table A

DATES WHEN WORKMEN'S COMPENSATION LAWS WERE ENACTED AND BECAME EFFECTIVE IN

UNITED STATES AND TERRITORIES

(NOTE — Most workmen's compensation laws have been amended or superseded since first enacted.)

	Approved	*Effective*	
		Administrative Provisions	*Liability Provisions*
Alabama	Aug. 23, 1919	Dec. 1, 1919	Jan. 1, 1920
Alaska	April 29, 1915	July 28, 1915	July 28, 1915
Arizona	June 8, 1912	Sept. 1, 1912	Sept. 1, 1912
California	April 8, 1911	Sept. 1, 1911	Sept. 1, 1911
Colorado	April 10, 1915	April 10, 1915	Aug. 1, 1915
Connecticut	May 29, 1913	Jan. 1, 1914	Jan. 1, 1914
Delaware	April 2, 1917	Jan. 1, 1918	Jan. 1, 1918
Hawaii	April 28, 1915	July 1, 1915	July 1, 1915
Idaho	March 16, 1917	July 1, 1917	Jan. 1, 1918
Illinois	June 10, 1911	May 1, 1912	May 1, 1912
Indiana	March 8, 1915	Sept. 1, 1915	Sept. 1, 1915
Iowa	April 18, 1913	July 4, 1913	July 1, 1914
Kansas	March 14, 1911	Jan. 1, 1912	Jan. 1, 1912
Kentucky (*a*)	March 21, 1914	Jan. 1, 1915	Jan. 1, 1915
Louisiana	June 18, 1914	Jan. 1, 1915	Jan. 1, 1915
Maine	April 1, 1915	Oct. 1, 1915	Jan. 1, 1916
Maryland	April 15, 1912	April 15, 1912	April 15, 1912
Massachusetts	July 28, 1911	July 1, 1912	July 1, 1912
Michigan	March 20, 1912	Sept. 1, 1912	Sept. 1, 1912
Minnesota	April 24, 1913	Oct. 1, 1913	Oct. 1, 1913
Missouri	April 28, 1919	Nov. 1, 1919	Nov. 1, 1919
Montana (*b*)	March 4, 1909	Oct. 1, 1910	Feb. 1, 1911
Nebraska	April 21, 1913	Dec. 1, 1914	Dec. 1, 1914
Nevada	March 24, 1911	July 1, 1911	July 1, 1911
New Hampshire	April 15, 1911	Jan. 1, 1912	Jan. 1, 1912
New Jersey	April 4, 1911	July 4, 1911	July 4, 1911
New Mexico	March 13, 1917	June 8, 1917	June 8, 1917
New York (*c*)	June 25, 1910	Sept. 1, 1910	Sept. 1, 1910
North Dakota	March 5, 1919	April 1, 1919	July 1, 1919
Ohio	June 15, 1911	Jan. 1, 1912	Jan. 1, 1912
Oklahoma	March 22, 1915	July 1, 1915	Sept. 1, 1915
Oregon	Feb. 25, 1913	Nov. 4, 1913	June 30, 1914
Pennsylvania	June 2, 1915	June 2, 1915	Jan. 1, 1916
Philippine Islands	Dec. 1, 1905	Dec. 1, 1905	Dec. 1, 1905
Porto Rico	April 13, 1916	July 1, 1916	July 1, 1916
Rhode Island (*d*)	April 29, 1912	Oct. 1, 1912	Oct. 1, 1912
South Dakota	March 10, 1917	July 1, 1917	June 1, 1917
Tennessee	April 15, 1919	July 1, 1919	July 1, 1919
Texas	April 16, 1913	Sept. 1, 1913	Sept. 1, 1913
Utah	March 15, 1917	March 15, 1917	July 1, 1917
Vermont	April 1, 1915	April 1, 1915	July 1, 1915
Virginia (*a*)	March 21, 1918	Oct. 1, 1918	Jan. 1, 1919
Washington	March 14, 1911	Oct. 1, 1911	Oct. 1, 1911
West Virginia	Feb. 22, 1913	Oct. 1, 1913	Oct. 1, 1913
Wisconsin	May 3, 1911	May 3, 1911	May 3, 1911
Wyoming	Feb. 27, 1915	April 1, 1915	April 1, 1915
United States	Sept. 7, 1916	Sept. 7, 1916	Sept. 7, 1916

(*a*) Act declared unconstitutional; substitute act now in force approved March 23, 1916; administrative provisions effective April 1, 1916; liability provisions effective August 1, 1916.

(*b*) Act declared unconstitutional; substitute act now in force approved March 8, 1915; administrative provisions effective March 8, 1915; liability provisions effective July 1, 1915.

(*c*) Act declared unconstitutional; substitute act now in force approved Dec. 16, 1913; administrative and liability provisions effective July 1, 1914.

(*d*) Passed over Governor's veto.

APPENDIX—Table B

DATES WHEN WORKMEN'S COMPENSATION LAWS WERE ENACTED IN

FOREIGN COUNTRIES AND PROVINCES

Alberta	March	5, 1908	New Brunswick	May	9, 1903
Argentina	Sept.	27, 1915	Newfoundland	Feb.	18, 1908
Australia	Dec.	24, 1912	New South Wales	Nov.	5, 1900
Austria	Dec.	28, 1887	New Zealand	Oct.	18, 1900
Belgium	Dec.	24, 1903	Norway	July	23, 1894
Brazil	Jan.	15, 1919	Nova Scotia	April	22, 1910
British Columbia	June	21, 1902	Ontario	May	1, 1914
Bulgaria	March	7, 1909	Peru	Jan.	20, 1911
Cape of Good Hope	June	6, 1905	Portugal	July	24, 1913
Chile	June	19, 1917	Quebec	May	29, 1909
Colombia	Nov.	15, 1915	Queensland	Dec.	20, 1905
Cuba	June	12, 1916	Roumania	Feb.	7, 1912
Denmark	Jan.	7, 1898	Russia	June	15, 1903
Finland	Dec.	5, 1895	San Salvador	May	12, 1911
France	April	9, 1898	Saskatchewan	March	23, 1911
Germany	July	6, 1884	Serbia	July	12, 1910
Great Britain	Aug.	6, 1897	South Australia	Dec.	5, 1900
Greece	March	6, 1901	Spain	Jan.	30, 1900
Hungary	April	9, 1907	Sweden	July	5, 1901
Italy	March	17, 1898	Switzerland	June	13, 1911
Japan	March	28, 1911	Tasmania	Jan.	13, 1911
Liechtenstein	April	30, 1910	Transvaal	Aug.	20, 1907
Luxembourg	April	5, 1902	Union of South Africa	July	1, 1914
Manitoba	March	16, 1910	Venezuela	Feb.	23, 1906
Mexico (Nuevo Leon)	Nov.	9, 1906	Victoria	Feb.	20, 1914
Montenegro	March	3, 1911	West Australia	Feb.	19, 1902
Netherlands	Jan.	2, 1901			

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